11110

(17,753.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

vs.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Caption to transcript from United States circuit court of appeals	a	1
Caption to transcript from United States circuit court	1	1
Transcript from district court of Lancaster county, Nebraska	1	1
Petition	1	2
Exhibit A—Memorandum as to	4	4
B—Inventory of property in Worthington Military Academy	4	4
Summons and sheriff's return	9	9
Petition for removal to Federal court	10	10
Answer	11	11
Bond for removal	14	13
Order continuing all matters, motions, and causes	14	14
Order of removal	15	14
Clerk's certificate to transcript	16	15
Reply	16	15
Jury empaneled; trial December 19, 1898	18	17
Trial December 20, 1898; verdict	19	17
Plaintiff's motion for judgment on the verdict	21	18

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 11, 1900.

	Original.	Print
Defendant's motion for judgment on the findings	21	19
Judgment	22	20
Bill of costs taxed in favor of plaintiff	23	21
Bill of exceptions	23	22
Testimony for plaintiff	23	22
Testimony of H. J. Walsh	24	23
Letter, G. H. Lermit to Grand View Building Association, August 2, 1898	25	23
Policy of insurance	27	24
Testimony of Burt W. Richards	29	24
Mrs. Ralston	29	24
C. H. Rudge	29	24
Testimony for defendant	30	25
Testimony of A. D. Borgelt	30	25
Admission that amount of premium was tendered plaintiff	31	25
Admission as to total amount of insurance	31	25
Defendant's motion to withdraw certain items from consideration of the jury and exception to court's ruling thereon	31	25
Recital that record contains all the evidence	31	26
Motion to instruct jury to find for defendant and exception to ruling thereon	31	26
Court's charge to the jury	31	26
Special verdict of the jury	35	29
Certificate of judge to bill of exceptions	38	31
Assignment of errors	38	31
Petition for and order allowing writ of error	39	32
Supersedeas bond	39	32
Writ of error and clerk's return	40	33
Citation and acceptance of service	42	35
Clerk's certificate to transcript	42	35
Appearance of counsel for plaintiff in error	43	36
Appearance of counsel for defendant in error	43	36
Stipulation as to order overruling petition for new trial	44	37
Order of submission	45	38
Opinion of United States circuit court of appeals	46	38
Judgment	54	47
Clerk's certificate to transcript	55	47
Stipulation as to return to certiorari	56	48
Writ of certiorari	58	49
Return to writ of certiorari	60	49

a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the December term, 1899, of said court, begun and held at the United States court-house, in the city of St. Louis, Missouri, on the first Monday in December, to wit, the fourth day of December, A. D. 1899, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit, on the tenth day of April, A. D. 1899, a transcript of record, pursuant to a writ of error directed to the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein The Northern Assurance Company of London, England, was plaintiff in error and The Grand View Building Association was defendant in error; which said transcript of record is in the words and figures following, to wit:

1 Pleas before the Honorable William H. Munger, judge of the district court of the United States for the district of Nebraska and sitting in the circuit court of the United States for the district of Nebraska, within the eighth judicial circuit, at the November, 1898, term thereof.

Be it remembered that on the 30th day of September, 1898, transcript from district court of Lancaster county, Nebraska, was filed in the clerk's office of said circuit court, which said transcript is in words and figures following, to wit:

23, 265.

Transcript.

Pleas in the district court of the third judicial district of Nebraska in and for the county of Lancaster.

At the September, A. D. 1898, term of said court, begun and held in the said city of Lincoln, in said county and State, on the 5th day of Sept., in the year of our Lord one thousand eight hundred and ninety-eight, and on a day therein, to wit, on the 29 day of Sept., A. D. 1898 (that being a day in vacation after September, A. D. 1898, term of said court)—present, Hon. Albert J. Cornish, judge presiding—the following proceedings were had and done, to wit:

Be it remembered that at the several times hereinafter set forth were filed in the office of the clerk of said court papers of which the following are true and correct copies, and proceedings, among

others, were had and done in the cause below named before ——, judge presiding, as follows:

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant. } Petition.

Petition.

Plaintiff complains of the defendant and for cause of action says:

1. Plaintiff is a corporation organized under the laws of Nebraska. The defendant is a corporation incorporated under the laws of the Kingdom of Great Britain and Ireland with power to insure property in the State of Nebraska against loss or destruction by fire.

2 2. On the 31st day of December, 1896, plaintiff was the owner of certain household and kitchen furniture and other articles of personal property hereafter described, situate in the three-story brick and stone building with slate roof on lot "F," in Grand View Residence Park addition in Lancaster county, Nebraska, occupied as a boys' military and boarding academy, which said personal property was of the value of $5,722.49.

On said December 31st, 1896, the defendant in consideration of the sum of $33.75 to it then paid by plaintiff as an insurance premium made and delivered to the plaintiff a policy of insurance on said property, a true copy whereof is hereto attached and made a part of this petition marked "Exhibit A," by the terms whereof defendant insured plaintiff for the term of two years from the 31st day of December, 1896, at noon to the 31st day of December, 1898, at noon against all direct loss or damage by fire to an amount not exceeding twenty-five hundred ($2,500) dollars to all of the aforesaid property while so located, which said property was in said policy referred to and described in the words following:

"Nothing on the three-story brick and stone building with slate roof and its additions including foundations and all fixtures and attachments of every description belonging to said building while occupied for dwelling purposes only, situated on lot F in Grand View Residence Park addition (referring to an addition to the city of Lincoln in Lancaster county, Nebraska), occupied as a boys' military and boarding academy.

$2,500.00 on household and kitchen furniture of every description, useful or ornamental, bedding, family wearing apparel, watches and jewelry in use, plate and plated ware, musical instruments, sewing machine, printed books and music, pictures, paintings, engravings and mirrors and their frames (at not exceeding cost), amateur photographic outfit, billiard tables, trunks, garden tools and implements, screens, fuel and family stores, all while contained in the above-described building."

3. On the first day of June, 1898, during the term of said insurance and while said policy was in full force the aforesaid property of plaintiff covered by said insurance was burned and wholly destroyed by fire; and such fire was not caused by any act or neglect of plaintiff.

4. Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of
3 California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that "it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance" on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

5. On or about the 26th day of July, 1898, within sixty days from date of said fire, the plaintiff rendered and delivered to defendant a statement signed and sworn to by its president giving all the particulars of said fire, and of its loss and damage thereby sustained by the terms of said policy required which the defendant accepted and still retains; and plaintiff on its part has complied with all the conditions of said policy.

6. The plaintiff was owner of said property when so destroyed by fire and the same was then of the value of $5,722.49 and a schedule of the items thereof is hereto attached marked "Exhibit B" and made a part of this petition.

7. On the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant disregarding its undertaking in that behalf denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at time of issuing its said policy.

8. No part of said insurance has been paid and there is now due

and payable thereon from defendant to plaintiff the sum of
4 two thousand five hundred ($2,500) dollars with interest thereon from the 26th day of July, 1898. Wherefore plaintiff prays judgment against defendant for the sum of two thousand five hundred ($2,500) dollars, with interest thereon from the 26th day of July, A. D. 1898, and costs of suit.

HALLECK F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, }
Lancaster County, } ss:

H. J. Walsh, being duly sworn, says on oath plaintiff is a corporation; I am its president and believe the facts stated in the foregoing petition are true.

H. J. WALSH.

Subscribed in my presence and sworn to before me this 30th day of August, 1898.

[SEAL.]

J. K. HONEYWELL,
Notary Public.

EXHIBIT "A."

Here follows copy of policy, original of which appears in the bill of exceptions.

EXHIBIT "B."

Inventory of Furnishing Goods in Worthington Military Academy, Lincoln, Nebraska.

2 chairs, .76; 1 bed, 3.50; 1st springs, 1.25	5.51
1 mattress, 2.10; 1 mirror, 1.25	3.35
1 kitchen table, with drawers	1.50
1 pillow, .80; water can, .90; 1 basin, .55	2.25
1 steam table, 45.00; 1 boiler, 40.50	85.50
1 set-pan, 6.50; 1 laundry stove, 14.00	20.50
1 wire mat, 5.50; 1 saucepan rack, 13.50	19.00
4½ doz. chairs	42.97
3 hampers, 10.50; 4 chairs, 20.00	30.50
1 parlor set, 42.50; 1 chair, 8.00	50.50
1 chamber set, 22.00; 1 mattress, 18.00	40.00
1 lamp, 35c.; 1 potato-slicer, 4.25	4.60
1 coffee-mill, 6.75; 1 ice-cream freezer, 6.85	13.60
1 vig.-slicer, 4.90; 1 set scales, 3.10	8.00
1 range, 96.00; 6 pails, .96	96.96
2 flour cans, 1.80; 3 clothes-horses, 2.85	4.65
3 sugar cans	1.20
2 office chairs, 10.50; 2¾ doz. chairs, 46.75	57.25
5 doz. chairs, 22.50; 56 mattresses, 263.20	285.70
1 (*rice*) cooking utensils	109.61
3 desks, 51.25; 1 settee, 15.00	66.25

5	1 bed-room set	22.00
	1 set springs, 1.25; 1 mattress, 5.60	6.85
4	mirrors, 3.70; 1 set springs, 3.23	6.93
56	iron beds	288.00
7	tables	45.00
4	hall seats	51.00
1	coffee urn, 20.50; 1 tea do., 10.50	31.00
1	set Rogers' knives & F., 2.90; 1 set T. spoons, 2.13	5.03
1	set tablespoons, 3.00; 8 commodes, 40.00	43.00
6	pillows, 13.00; 1 suit, 22.00; 2 wardrobes, 16.00	51.00
4	tables, 7.75; 2 mattresses, 11.00; 2 sets springs, 2.50	21.25
60	desks, 210.20; 27 seats, 152.80	363.00
1	set charts & globe	160.00
1	zinc box, 2.00; 1 armchair, 8.60; 2 drip-pans, .40	11.00
		$2,054.45
		$2,054.45
4	kitchen tables, 6.46; 1 Rockford table, 33.75	40.16
6	spoons, .45; grater, .05	.50
1	potato-masher, .30; 1 sifter, .25	.55
1	saucepan, 2.75; 3 dippers, .45	3.20
3	covers, .25; 1 dresser & commode, 17.00	17.25
1	chair, 1.10; 1 rocker, 1.50	2.60
36	commodes	116.10
1	kitchen table	3.23
1	dish-pan, .65; 2 doz. Rogers' knives & forks, 11.60	12.25
1½	doz. tablespoons, 6.38; 4 doz. tea do., 8.80	15.18
½	doz. butter knives, 2.30; ½ doz. sugar spoons, 1.88	4.18
1	wringer, 2.60; 1 wardrobe, 8.00	10.60
10	commodes, 32.30; 1 wardrobe, 7.00	39.30
1¼	doz. chairs, 6.05; 1 chop bowl & knife, .80	6.85
4	scoops, .72; 1 oatmeal cooker, 2.00	2.72
1	hod, .45; 1 do., .60	1.05
2	lawn settees, 6.50; 1 refrigerator, 87.50	94.00
1	bell, 1.50; 1 step-chair, 1.50	3.00
1	step-ladder, 2.50; 1 pr. shears, .75	3.25
1	brush, .75; 1 doz. knives & forks, 8.25	9.00
1	dish-pan, 1.10; 3 tin pans, .15	1.25
1	carpet-sweeper, 3.00; 1 scoop, 1.25	4.25
1	iron roasting pan (to order)	4.90
1	rocker, 4.00; table, 6.00; 1 rocker, 2.50; 3 settees, 10.00	22.50
1	thermometer, .90; 1 cot mattress, 3.75	4.65
2	doz. glasses, 1.00; 1 bed R. set, 27.00	28.00
	1 mattress, 7.00; 1 pr. pillows, 4.00	11.00
6	1 table, 10.00; 1 rocker, 5.00; 1 sew. rocker, 3.50; springs, 4.50	23.00
1	doz. milk-pans, 1.60; oil stove, .50	2.10
1	tin basin, 10c.; 2 bookcases, 20.00	20 10

1 but. paddle, .15; 1 pail, .25; 1 set cover, 1.50; 2 mirrors, 2.00	3.90
1 stool, .80; 2 pans, .60; 12 pans, 1.00	2.40
1 set irons, 1.35; 3 brushes, 1.50	2.85
1 teapot, 1.30; strainer, .10	1.40
3 set- covers, 4.05; 1 griddle, .50	4.55
	$2,576.27
1 flour-sifter, .25; 1 kitchen table, 1.75	2.00
1 stool, .90; 1 pail, .25; cookers, 3.50	4.65
1 bread pan, 1.15; 1 mirror, 1.10	2.25
1 wardrobe, 9.00; 3 bells, .35	9.35
2 rockers, 4.20; 1 tea kettle, .90	5.10
1 bucket, 1.25; 1 scoop, 1.00	2.25
3 joints of pipe, 1.70; 1 mirror, .75; caster, .10	2.55
1 pillow, 1.50; 1 chop-bowl, .65	2.15
1 drip-pan, to order	1.75
1 egg-beater, can-opener & sifter	1.20
1 bread-riser, .15; mustard spoons, .15	.30
1 Sech water front	10.75
1 mouse trap	.45
2 candlesticks, .20; coffee-boiler, 2.00	2.20
1 kit. table, 1.35; 1 can, .30	1.65
1 kit. table, 1.75; 1 fork, .10	1.85
960 ft. matting, 5.76; 210 ft., 1.26	7.02
2 paring knives, .25; sieve, .20	.45
1 can, .50; 1 chop-bowl, .35	.85
2 butter paddles, .20; caster, .35; 1 kettle, .70	1.25
1 doz. tablespoons, 1.00; 1 water-cooler, 5.00	6.00
2 towel racks, .20; 23 yds. carpet, 19.55	19.75
6 milk pans, .90; mirrors, .65	1.55
1 waffle iron, .90; pail, .35	1.25
1 pr. scissors, .50; 1 pail, .40	.90
Knives & forks, .30; 1 cooker, 1.25	1.55
12 milk pans, 1.65; 1 masher, .45; egg-whipper, .05	2.15
1 set covers, 3.00; 1 kitchen table, 1.50	4.50
1 sew. *9* table & kitchen table	3.00
1 waffle iron, .90; 1 officers' table, 2.25	3.15
1 pail, .35; 1 wash-dish, .30	.65
2 milk-covers, .70; 1 pail, .80	1.50
7 1 kettle, .65; 3 kitchen chairs, .50	1.15
3 knives and forks, .35; dipper, .60	.95
	2,684.44
Spoons	.55
1 cake-turner, .30; kettle, 1.00	1.30
3 trays	1.50
2 dish-pans	1.75
Apple-parer	.90
1 piece carpet	1.25
Scissors & lamp	1.65

1 skillet, .60; can, .40	1.00
Knives, .30; kettle & grater	.95
1 porcelain kettle	1.00
1 pot fryer	.35
1 egg basket	.15
1 galv. pan, .50; hose, 7.00	7.50
2 knives, .25; 6 pans, .90	1.15
12 dust-pans	.90
2 slop-pails, .80; 2 do., .50	1.30
6 chairs, 5.50; 2 do., 3.50	9.00
1 table, 6.25; 1 do., 16.50	22.75
2 rockers, 4.00; 1 do., 2.50	6.50
4 doz. plates, 4.20; 4 dishes, .82	5.02
2 doz. cups and saucers	2.40
6 pitchers, .90; (6), 1.20; (6), 1.00	3.10
5 doz. butters, 1.75; glasses, 1.40	3.15
6¾ yds. carpet, 5.50; scoop, 1.00	6.50
2 doz. bowls, 2.00; 3 rugs, 6.50	8.50
3 kettles, 1.00; strainers, .36	1.36
6 pans, 1.26; saucepan, .25	1.51
Galv. cups, .50; coal-hod, .35	.85
1 pail, .50; dish-pan, .45	.95
1 cooker, .35; shades, 3.50	3.85
14 shades, 1.40; shears, .90	2.30
1 kettle	1.00
1 hod, .35	.35
1 gasoline stove	30.00
1 galv. slop-can	7.00
	2,823.73
2 oils (set up)	10.00
Chapel furniture	100.00
Pictures	120.00
Piano, "Weber"	200.00
Organ, M. & H	50.00
Funk & Ogden bill	
Crockery & glasses	346.65
8 Hardy furniture	7.50
3 dormitory furniture	24.00
Gas & elect. fixtures	200.00
Books in library	300.00
Chemicals and furniture in laboratory	200.00
Gymnas. fixtures, Id. lockers	100.00
Quartermaster supplies	100.00
Provision in store-room	155.84
Coal	10.00
14 pair- blankets, (11), 36.00; (1), 8.00; (2), 8.00	52.00
21 comforters	32.25
8 bed-spreads	20.00
3 pr-. hemstitch pillow-cases	3.00
24 pr-. do	9.60

2 stand lamps	5.00
2 toilet-sets	8.50
90 6/4 bed sheets, .25	22.50
36 10/4 bed sheets, .40	14.40
48 Turk. towels	14.40
8 pr-. pillows, (4), 14.00; (4), 10.00	24.00
35 pr-. pillows for 1/2 beds, 1.25	43.75
6 doz. towels	18.00
4 doz. towels	6.00
10 lin. table-cloths	30.00
8 doz. napkins	14.00
Am't forward	5,065.12
2 doz. damask towels	6.00
2 doz. wiping towels	2.00
2 tapestry table-covers	4.50
3 pr-. lace curtains	9.00
1 pr. tap. do	9.00
1 7-ft. pole & fixtures	1.50

Goods purchased by Rev. J. Hewitt:

Lincoln Carpet Co.	121.72
Lincoln Carpet Co.	154.68
Lincoln Carpet Co.	56.35
	26.10
	18.35
	88.93
	3.60
	23.72
	36.50
	48.45
	5.00
	13.21
	1.26
	4.50
9 3 clocks (1), 12.00; (1), 5.00; (1), 1.50	18.50
1 letter-press	4.50
	$5,722.49

Indorsed: District court, Lancaster Co., Neb. Grand View Building Ass'n *v.* Northern Assurance Co. Petition. Clerk's office, district court. Filed Aug. 30, 1898. Sam. E. Low, clerk district court.

Summons.

STATE OF NEBRASKA, } ss:
Lancaster County, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify The Northern Assurance Company of London, defendants, that *they* have been sued by Grand View Building Association, plaintiff, in the district court of the third judicial district in and for said county of Lancaster, and that unless it answer by the 3rd day of October, A. D. 1898, the petition of The Grand View Building Ass'n, plaintiff, filed against it in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this summons on or before the 12th day of September, A. D. 1898.

Witness my hand and seal of said court, at Lincoln, this 30th day of August, A. D. 1898.

[SEAL.]

SAM. E. LOW, *Clerk,*
By J. H. MALLALIEU, *Deputy.*

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that on the 30th day of August, 1898, I served the within writ of summons on the within-named The Northern Assurance Company of London by delivering in person to A. D. Borgelt, attorney, for service a true and certified copy of the same, with all indorsements thereon; all done in Lancaster county, Nebraska, as required by law.

JOHN J. TROMPEN, *Sheriff,*
By F. M. WOODWARD, *Deputy.*

Fees.

Service and return	$ .50
Copy	.25
Mileage	.10
Total	.85

Indorsed: Summons. District court, Lancaster county. Doc. 23, page 265. Grand View Building Ass'n, plaintiff, *vs.*
10 Northern Assurance Co., defendant. If defendant fail to appear and answer the plaintiff will take judgment for $2,500, together with interest thereon from July 26, 1898, and costs of suit. Attest: Sam. E. Low, clerk, by J. H. Mallalieu, deputy. Returnable Sep. 12, 1898. H. F. Rose. Received Aug. 30, 1898. John J. Trompen, sheriff. Clerk's office, district court. Filed Sep. 1, 1898. Sam. E. Low, clerk district court.

Petition for Removal.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Petition for removal to the circuit court of the United States for the district of Nebraska.

Your petitioner The Northern Assurance Company of London, England, respectfully shows to this honorable court that it is the defendant in the above-entitled action which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of $2,000 exclusive of interest and costs. That the controversy herein is between citizens of different nations. That the plaintiff The Grand View Building Association was at the time of the commencement of this suit and still is a corporation created under the laws of Nebraska, transacting its business within the State of Nebraska. That the defendant is a corporation created under the laws of the Kingdom of Great Britain and Ireland, with its general western department managed from the city of Chicago, Illinois, and is a non-resident of the State of Nebraska. And your petitioner desires to remove this suit before the trial thereof into the circuit court of the United States to be held in the district of Nebraska. And your petitioner offers herewith good and sufficient surety for its entering in said court on the first day of its next session a copy of the record in this cause and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto.

And your petitioner therefore prays that the said surety and bond may be accepted and that an order may be entered removing this cause to the circuit court of the United States for the district of Nebraska, and that no further proceedings may be had herein. And we will ever pray.

THE NORTHERN ASSURANCE COMPANY
OF LONDON, ENGLAND,
By GREENE & BRECKENRIDGE, *Its Attorneys.*

11 STATE OF NEBRASKA, *Douglas County,* } ss:

R. W. Breckenridge being duly sworn says he is one of the attorneys for the petitioner named in the foregoing petition for removal; that said petitioner is a corporation and affiant is authorized to verify said petition; and that the facts therein stated are true as affiant believes.

Further affiant saith not.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.] CHAS. V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Petition for removal to the circuit court of the United States for the district of Neb. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant. } 23, 265.

Answer.

Comes now the defendant, The Northern Assurance Company of London, England, and answering the petition of the plaintiff herein, says:

It admits the allegations contained in the first paragraph of the plaintiff's petition.

Defendant admits that on the 31st day December, 1896, plaintiff was the owner of a certain property mentioned and described in the second paragraph of said petition which on the said day was insured by the defendant as stated in said petition.

Defendant admits that on June 1, 1898, the property described in the policy of insurance written by the defendant was burned, but denies that at said time the said policy was in full force, and alleges that said policy was not then in force.

Defendant denies specifically the allegations of the fourth paragraph of said petition.

12 Defendant admits that within 60 days from the date of said fire the plaintiff forwarded to this defendant what is denominated proofs of loss, the receipt of which so-called proofs of loss the defendant acknowledged, stating that it held same subject to the order of the plaintiff.

Defendant admits that at the date of said fire the plaintiff was the owner of the property which was burned, but denies that it was of the value stated in the 6th paragraph of the petition.

Defendant denies the allegations of the seventh paragraph of the petition, but admits that it denies liability.

Defendant denies the allegations of the 8th paragraph and further denies that there is anything due from the defendant to the plaintiff.

Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"This entire policy, unless otherwise provided by agreement in-

dorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not, on property covered in whole or in part by this policy."

The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued "in consideration of the stipulations" therein named and of a certain amount of premium paid therefor. And said policy, besides the provisions above quoted, contains the following stipulation and condition:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be indorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

13 This defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing and without the knowledge of the defendant, the plaintiff obtained a policy of insurance upon the property covered by the policy issued by this defendant in the sum of $1,500 in the Firemen's Fund Insurance Company.

Defendant says that the property upon which it issued its policy in the sum of $2,500 was represented by the plaintiff to the defendant to be of the value of $3,500.

The defendant alleges that by reason of the additional insurance upon said property not consented to in writing endorsed upon the policy of defendant and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional insurance.

Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current funds the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75 with interest at the rate of 7 % from Dec. 31st, 1896.

Wherefore, this defendant prays that judgment may be rendered against it for said sum of $33.75 with interest from Dec. 31st, 1896, with the costs of suit up to the filing of this answer, and no more.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

STATE OF NEBRASKA, } ss:
Douglas County, }

R. W. Breckenridge, being duly sworn, says he is one of the attorneys for the defendant in the foregoing action named; that said defendant is a corporation, hence affiant makes this verification that the facts stated in the foregoing answer are true as he believes.

R. W. BRECKENRIDGE.

Subscribed in my presence and sworn to before me this 19th day of September, 1898.

[SEAL.]

CHARLES V. MILES,
Notary Public.

Indorsed: Docket 23, No. 265. District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Answer. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

14 *Bond for Removal.*

In District Court, Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff, *vs.* THE NORTHERN ASSURANCE COMPANY OF LONDON, England, Defendant. } Bond for Removal.

Know all men by these presents that I am holden and stand firmly bound unto Grand View Building Association in the penal sum of five hundred dollars for the payment whereof well and truly to be made unto the said Grand View Building Association, its successors and assigns, I bind myself, my heirs, representatives and assigns jointly and firmly by these presents;

Upon condition, nevertheless, that whereas the Northern Assurance Company, of London, England, has filed its petition in the district court of Lancaster county, Nebraska, for the removal of a certain cause therein pending wherein said Grand View Building Association is plaintiff and The Northern Assurance Company of London, England, is defendant, to the circuit court of the United States for the district of Nebraska.

Now if the said The Northern Assurance Company of London, England, shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in such suit and shall pay all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and effect.

In witness whereof, I have hereunto set my hand and seal this 19th day of September, 1898.

FREDERICK H. DAVIS.

I hereby approve the foregoing bond for removal and surety.

ALBERT J. CORNISH,
Judge of the District Court, Lancaster County, Nebraska.

Indorsed: District court, Lancaster county, Nebraska. Grand View Building Ass'n, pl'ff, *vs.* The Northern Assurance Co., def't. Bond for removal. Clerk's office, district court. Filed Sep. 20, 1898. Sam. E. Low, clerk district court.

Journal Entry.

That on the 18th day of July, A. D. 1898 (that being the 57th juridical day of the September, A. D. 1898 term of said court)
15 were had and done the following proceedings, as appears upon Court Journal "30" at page "694," to wit:

It is hereby ordered that all causes, matters and motions now pending in this court and not otherwise disposed of be, and the same hereby are continued until the next term of this court.

The May term of this district court was begun on the 2nd day of May, A. D. 1898, and continued from day to day and from time to time, by regular adjournment, until this 8th day of July, A. D. 1898, and now is adjourned without day.

Order.

In the District Court of Lancaster County, Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

This cause came on for hearing on the petition of the Northern Assurance Company of London, England, for the removal of the same to the circuit court of the United States for the district of Nebraska. On consideration whereof the court finds:

That said action is of a civil nature, and that the amount in dispute exceeds the sum of two thousand dollars, exclusive of interest and costs; that the plaintiff is a corporation created under the laws of the State of Nebraska, and doing business therein; that the defendant is a corporation created under the laws of the Kingdom of Great Britain and is non-resident of the State of Nebraska.

The petitioner having offered a good and sufficient surety for its entering into said court and for paying all costs that may be awarded, if said court shall hold that such suit was wrongfully or improperly removed thereto; the said bond being approved, the said cause is ordered removed to the said circuit court of the United States in and for the district of Nebraska.

ALBERT J. CORNISH,
Judge District Court.

Dated Lincoln, Neb., Sept. 29th, 1898.

Indorsed: 23,265. Grand View Building Ass'n *vs.* Northern Assurance Company. Order for removal. Clerk's office, district court. Filed Sep. 29, 1898. Sam. E. Low, clerk district court.

16 *Certificate.*

STATE OF NEBRASKA, } ss:
Lancaster County, }

I, Sam. E. Low, clerk of the district court, third judicial district of Nebraska, in and for the county of Lancaster, do hereby certify that the above and foregoing is a true and correct copy of the petition, summons; petition for removal; answer; bond for removal, order of court, with endorsements on each, together with proceedings of trial, adjournment *sine die* of our said court, in a cause therein wherein The Grand View Building Association is plaintiff and The Northern Assurance Company is defendant, as the same appears fully upon the records and files of said court and now in my charge remaining as clerk aforesaid.

In witness whereof I have hereunto set my hand officially and attached the seal of said court at Lincoln, this 29 day of Sept., A. D. 1898.

[SEAL.] SAM. E. LOW, *Clerk D. C.*,
By J. H. MALLALIEU, *Deputy.*

[10-cent internal-revenue stamp.]

Trans. fee, $9.00.

Transcript endorsed: Filed Sep. 30, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 5th day of October, 1898, reply was filed in said case, which said reply is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Reply.

The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said answer, of $1,500.00 in the Firemen's Fund Insurance Company, was, on the con-

trary, subsisting at and prior to the issuance by defend-
17 ant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire-insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt, the fact of such subsisting insurance of $1,500.00; and said Borgelt as such agent, with full knowledge of said fact, accepted the risk and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the said subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts, the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

Plaintiff denies that it ever represented to defendant that the property described in and insured by said policy of insurance was of the value of $3,500.00.

Wherefore plaintiff prays for judgment as in its petition prayed.

H. F. ROSE,
Attorney for Plaintiff.

STATE OF NEBRASKA, } ss:
Lancaster County, }

H. J. Walsh, being first duly sworn, says on oath plaintiff is a corporation, and I am its president, and I believe the facts set forth in the foregoing reply to be true.

H. J. WALSH.

18 Subscribed in my presence and sworn to before me this first day of October, A. D. 1898.

[SEAL.] WILLARD HAMMOND,
Notary Public.

Indorsed: Filed Oct. 5, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 19th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
THE NORTHERN ASSURANCE COMPANY OF LONDON. } 285, "T."

Jury Trial Begun.

This cause being regularly called for trial, plaintiff appears, by its attorney, H. F. Rose, Esq., and the defendant, by R. W. Breckenridge, Esq. Thereupon, upon motion of plaintiff's said attorney, it is ordered that a jury come, to wit:

Amos Weller,	C. G. Vanness,
J. E. Mendenhall,	W. R. Fuller,
H. Timme,	J. R. Kelsey,
O. J. Davis,	N. H. Meeker,
J. B. Lyons,	Carr Oxford,
E. P. Brewster,	S. D. Jolly,

twelve good and lawful men who are duly sworn and empaneled to try the issues joined herein; thereupon testimony is heard on behalf of the plaintiff, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be, and they hereby are, postponed until tomorrow morning at 9 o'clock.

Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 20th day of December, 1898, the following proceedings were had and done in said case, as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY, ETC. } 285, "T."

Record of Jury Trial; Special Verdict.

This day again come the parties herein by their respective attorneys, also the jury heretofore duly empanelled and sworn to try the issues joined herein, and after hearing further evidence in said cause, the arguments of said attorneys, and the charge of the court,
19 the jury retire to consider of their verdict, and after due consultation concerning the same, and being fully advised in the premises, they find, and return into court by their foreman, their verdict, which is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

"This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy also contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed thereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?"

Answer. Yes.

20 Finding 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the de-

fendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898?

Ans. ($4,140.00) four thousand one hundred forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?

Answer. No.

Finding 10. Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $4,000.00.

W. H. MEEKER, *Foreman.*

21 Original verdict endorsed: Filed Dec. 20, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, plaintiff's motion for judgment on the verdict was filed in said case, which said motion is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Motion for Judgment on the Verdict.

1. Plaintiff moves the court for judgment herein in its favor against defendant for the sum of $2,500.00, and interest thereon from commencement of suit, August 30, 1898, and costs, because the facts found by the jury conclusively establish plaintiff's right to recover of defendant the full sum prayed for in the petition.

2. Defendant, by issuing its policy and receiving the premium

therefor, with knowledge of the existing insurance of fifteen hundred dollars ($1,500.00) in Firemen's Fund Insurance Company, communicated beforehand by assured to A. D. Borgelt, its recording agent, who issued the policy, as by the jury specially found, waived the conditions of said policy set forth in the answer, and is estopped thereby to claim a forfeiture or assert the invalidity of said policy by virtue of said conditions.

HALLECK F. ROSE,
Attorney for Plaintiff.

Indorsed: Filed December 22, 1898. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 22nd day of December, 1898, defendant's motion for judgment on findings was filed in said case, which said motion is in words and figures following, to wit:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY, Defendant.

Motion for Judgment on Findings.

Comes now the defendant and moves the court to render judgment in favor of defendant upon the findings of the jury returned herein.

GREENE & BRECKENRIDGE,
Attorneys for Defendant.

Indorsed: Filed Dec. 22, 1898. Oscar B. Hillis, clerk.

22 Thereupon afterwards, to wit, at the November, 1898, term of said court, and on the 14th day of January, 1899, the following proceedings were had and done in said case as appear of record in Journal — of said court, to wit:

GRAND VIEW BUILDING ASSOCIATION
vs.
NORTHERN ASSURANCE COMPANY. } 285, "T."

Motion Overruled; Judgment.

This cause having heretofore been tried before a jury and a special verdict having been duly rendered and filed herein, and plaintiff having heretofore to wit, on the 22nd day of December, filed its motion for judgment upon said verdict, in its favor and against the defendant; and the defendant, having on the same day filed its motion for judgment upon said verdict, in its favor, and said motions having been fully argued by the attorneys for the respective parties, duly submitted and by the court taken under advisement,

Now, after due consideration thereof, and being fully advised in the premises, it is by the court

Ordered, that the motion of defendant for a judgment in its favor upon said verdict be and it hereby is overruled and denied.

To which order the defendant excepted.

And it is further ordered by the court that plaintiff's motion for judgment in its favor be and it hereby is sustained.

Thereupon, it is considered, ordered and adjudged by the court that the plaintiff, The Grand View Building Asssociation do have and recover of and from the defendant, The Northern Assurance Company, of London, England, the sum of twenty-five hundred dollars ($2,500.00), with interest thereon at 7% per annum, from September 26th, 1898, besides its costs and disbursements herein taxed at the sum of $45.75, and that it have execution therefor.

And upon motion of defendant's attorneys, it is by the court ordered that defendant be and it hereby is given forty days from and after this date within which to prepare and settle a bill of exceptions.

Thereupon, afterwards, to wit: on the 27th day of January, 1899, bill of costs taxed in favor of Grand View Building Ass'n was filed in said case, which said bill of costs is in words and figures following, to wit:

23 In the Circuit Court of the United States for the District of Nebraska.

Bill of Costs Taxed in Favor of Grand View Building Ass'n in the Case of—

GRAND VIEW BUILDING ASS'N
vs.
THE NORTHERN ASSURANCE CO. } No. 285, Doc. "T."

Clerk's fees (for items see appearance docket)	$24.90
Witness fees:	
Name, Burt W. Richards, 2 days, 110 miles	8.50
" H. J. Walsh, 2 days, 110 miles	8.50
" Mrs. Ralston, 1 day, 5 miles	1.75
" C. H. Rudge, 1 day, 110 miles	7.00
Attorney's fees, *i. e.*, docket fee, $20.00	20.00
Total	$45.75

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

I, Oscar B. Hillis, clerk of the circuit court of the United States for said district of Nebraska, do hereby certify that the above and foregoing is a true statement of the costs taxed and allowed in favor of Grand View Building Ass'n in the above-entitled case, and that the same are just and legal as I verily believe.

Witness my hand and the seal of said court this 27th day of Jan'y, 1899.

[SEAL.]

OSCAR B. HILLIS, *Clerk*,
By R. C. HOYT, *Deputy*.

Indorsed: Filed Jan. 27, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, bill of exceptions was filed in said case, which said bill of exceptions is in words and figures following, to wit:

United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
vs.
NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Defendant.

Bill of Exceptions.

Be it remembered that on the trial of this cause in the circuit court of the United States for the district of Nebraska, before the Honorable William H. Munger, and a jury duly impaneled therein, at the November term of said court, on the 19th day of De-
24 cember, 1898, the plaintiff to maintain the issues upon its part offered as a witness H. J. WALSH, who being duly sworn testified that he is president of the Grand View Building Association and was such officer of the plaintiff at the time the policy in suit was issued, and acted for and in behalf of the plaintiff in the matter of procuring the issuance of the policy. He dealt with respect thereto with Mr. Borgelt, the agent of the defendant who has an office in the Walsh & Putnam block, in Lincoln, Nebraska. Previous to the date of the policy in suit, witness had conversations with Borgelt both in the office of witness and in Borgelt's office regarding the insurance. The defendant had a previous policy on the water works and power-house of the plaintiff, but Borgelt informed witness that the defendant objected to the risk and asked Borgelt to cancel the policy, and witness, wishing to favor Borgelt as he was a tenant of witness, told Borgelt that there was but $1,500.00 insurance on the furniture and it would carry $4,000.00. Witness understood from his book-keeper that there was at that time about $4,800.00 worth of furniture in the building and Borgelt thought he could write the $2,500.00 additional insurance on the furniture and said he would do so. Witness did not procure any further or additional insurance on the subject of insurance covered by the policy in suit after the date of its issuance. Whatever insurance there was on the property was specified at the time this policy was issued and there was no other or different insurance than that which witness has referred to as having been mentioned to Mr. Borgelt. Witness requested Burt Richards, an insurance agent who had the other policy, to confer with Borgelt about the insurance before it was written in behalf of plaintiff, and witness thinks that Richards was present at some time when he had a conversation

with Borgelt about the matter, and Richards and Borgelt conferred about making their policies concurrent.

The policy in suit was delivered to witness by Mr. Borgelt at the office of witness. The premium was paid to Mr. Borgelt. When the policy was delivered witness put it in his safe. Witness never looked at the policy; he supposed it was like all of his policies and presumed the endorsement permitting concurrent insurance was on the policy and did not know for two or three weeks after the fire but that the policy was all right. The witness gave in detail the various items of personal property which were covered by the policy, and estimated its value at $5,722.49. Witness forwarded an inventory of the goods destroyed, an exact copy of which is attached to the petition in the suit, by registered mail to Mr. Lermit, the manager of the defendant company in Chicago, and received in reply thereto the following letter:

25 "CHICAGO, *Aug.* 2, 1898.

Grand View Building Association, H. J. Walsh, president, Lincoln, Nebraska.

DEAR SIRS: We have your favor of the 26th ult. enclosing to us what purports to be proof of loss, making claim under our policy No. 310,024 of Lincoln, Neb., agency, and issued to you for $2,500 on household furniture, etc., while contained in the three-story brick and stone building on lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein advises us that you had other insurance on this same property to the amount of $1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12, and 13 of the printed conditions of our policy, to which we beg to refer you.

We, therefore, regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024, held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to. Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely $33.75, at once.

We further beg to say that we are holding your purported proofs of loss, subject to your order.

Yours very truly, G. H. LERMIT, *Manager*,
By A. E. CLOUGH, *Att'y.*"

The policy was signed by Borgelt & Beasley, and the Borgelt mentioned by witness is of that firm.

The plaintiff thereupon offered the original policy in evidence, which was received without objection, and is as follows:

(Here follows policy marked pp. 26 and 27.)

29 Thereupon the plaintiff to further maintain the issues on its part, produced as a witness BURT W. RICHARDS, who, being duly sworn, testified that he lives in Lincoln, and knows Mr. Walsh and Mr. Borgelt. Witness had conversations with Mr. Walsh and Mr. Borgelt regarding the matter of insurance on furniture in the Worthington academy owned by the plaintiff during the month of December, 1896, and prior to December 31st. Witness was requested by Mr. Walsh to see Mr. Borgelt, and pursuant to that request, saw him. The conversation the witness had with Borgelt was in Borgelt's office. Mr. Walsh had asked witness to take a certain policy of the Northern Assurance Company, covering the power plant to Mr. Borgelt, and have Borgelt rewrite it upon the furniture of the plaintiff which owned and operated the Worthington Military Academy and for the reason that the Northern Assurance Company had declined to carry the power plant, and Mr. Walsh had made arrangements with witness to write the insurance on the power plant; witness took the policy in the defendant's company, covering the power plant, and went across to Mr. Walsh's office and laid it on his desk, and said to Borgelt, "Mr. Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself, inasmuch as your company won't carry it; so you write this up on the furniture concurrent with our policy of $1,500 on the furniture now." The $1,500 policy referred to was in the Firemen's Fund and witness had been the solicitor that had obtained the order for that $1,500 policy.

On cross-examination the witness testified that the conversation referred to took place about the same date when the policy in the defendant company was written and before the delivery of the policy in suit.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its behalf Mrs. RALSTON, who, being duly sworn, testified that she was the matron of the Worthington Military Academy, and testified in detail concerning all items of property which were destroyed by fire, specifying the same items that are set forth at length in the inventory, a copy of which is attached to the petition in the case. The property had, most of it, been in use for a number of years.

Thereupon the plaintiff to further maintain the issues upon its part, called as a witness in its own behalf C. H. RUDGE, who, being duly sworn, testified that he is a member of the Rudge & Morse Company, engaged in the house-furnishing business at Lincoln, where he has been in business for twelve or thirteen years.

30 He knows the Worthington Military Academy and its president, Mr. Walsh; and his house furnished practically all of the furniture and fixtures, outside of the carpets and glassware, which fitted up the Worthington Military Academy owned by the Grand View Building Association. He has inspected the invoice attached to the original petition, and in his opinion, the items

thereon are of the reasonable value of seventy-five per cent. of the cost price, as stated in the inventory.

Thereupon the plaintiff rested, and the defendant to maintain the issues upon its part, produced as a witness A. D. BORGELT, who being duly sworn, testified that he is a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, and is a member of the firm of Borgelt & Beasley that wrote the policy in the Northern Assurance Company on the Grand View Building Association. At the time he wrote that policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit and the first time he knew of any other insurance was after the fire. Richards and the witness never had any conversation with regard to the writing of the policy in suit. The witness dealt with Mr. Walsh and Mr. Walsh didn't say anything to him about any other insurance. The witness recalls that there was a value placed upon the property that was to be covered by the $2,500 insurance, but he does not remember where he got it from. Witness is recording agent of the defendant in Lincoln and reports his business to Chicago.

On cross-examination the witness testified that he talked to Mr. Walsh about the policy in his office, having previously gone to Mr. Walsh's office to inform him of the cancellation of the other policy, and at that time he told Mr. Walsh that he would like to have him place other insurance with him, and that he would like to carry the risk covered by the policy in suit. Witness was at that time a tenant of Mr. Walsh's building, with an office on the same floor with Mr. Walsh. The policy in suit was written after the cancellation of the previous policy on the power-house of the Grand View Building Association. The power-house policy was not ordered by Mr. Walsh, but was ordered by Mr. Richards from the Farmers' and Merchants' Company, and the talk witness had with Mr. Richards was about the power-house policy. During the conversation between witness and Walsh, Walsh told witness he could have the insurance on the furniture. The policy was in the same amount and the premium was the same that was charged upon the power-house policy. Witness does not remember that Walsh said anything to him about having $1,500 on the furniture and that it would carry more, but he might have mentioned it.

31 On redirect examination the witness testified that he has no recollection of having known anything about the other insurance until after the fire.

It was stipulated that on August 4, 1898, the premium paid for the policy in suit in the sum of $33.75 was tendered to the plaintiff and that the plaintiff refused to take it.

It was further stipulated that the total amount of insurance upon the property at the time it was destroyed was $4,000.00.

Whereupon the defendant rested.

The defendant moved the court to strike out the evidence relative to and withdraw from the consideration of the jury, the items desig-

nated in the schedule attached to the petition, "Chemicals and furniture in laboratory," which motion was sustained.

The defendant moved the court to withdraw from the consideration of the jury and to instruct the jury not to consider the items following: "60 desks, $210.20; 27 seats, $152.80; 1 set of charts and globe, $160; gas and electric fixtures, $200; gymnasium fixtures and locker, $100;" also the various bills scheduled as purchased by Rev. A. Hewitt, not itemized, aggregating $602.37, which motion was overruled. Defendant excepted.

No further testimony was offered by either party, both parties rested, and the foregoing is all the testimony offered or given upon the trial of this case.

The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

Thereupon afterwards and after arguments of counsel, the court instructed the jury as follows:

Instructions to the Jury.

GENTLEMEN OF THE JURY:

As you have discovered during the progress of this trial, there are one or two legal questions involved, and the court has thought it advisable rather than to pass upon them with a hurried examination which, if the conclusion I should arrive at now should be afterwards found to be wrong would result in a retrial, to submit to you special findings for you to pass upon, and then the court can upon those findings render such a judgment as after more mature reflection and consideration of the legal questions involved shall seem to be right and proper.

32 Most of the questions submitted to you for answer there is no dispute about between the parties, and you are directed by the court to answer them in the manner in which they have been answered, in other words, as they are inserted.

They are as follows:

"(1.) Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?"

There is no dispute about that, so that is answered, "Yes."

"(2.) Was the property covered by said policy of insurance burned on or about June 1, 1898?"

There is no dispute about that so that is answered, "Yes."

"(3.) Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?"

There is no dispute about that and that is answered, "Yes."

"(4.) Did the policy issued to the plaintiff by the defendant contain the following provisions:

'This entire policy unless otherwise provided by agreement endorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.'

And did said policy also contain the following provision:

'This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached?'"

There is no dispute about that, so that is answered, "Yes."

"(5.) Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Fireman's Fund Insurance Company?"

There is no dispute about that and that is answered, "Yes."

"(6.) Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined; and did he issue the policy in question as such agent?"

There being no dispute about that, the proper answer that is written in is as follows:

33 "Answer. A. D. Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent."

"(7.) Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?"

That is a disputed proposition, so that you must answer that question. The word "answer" is written under the question, and you will write after the word "answer," either yes or no. That question is susceptible of being answered by the simple word yes or no.

"Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Fireman's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?" That is the first question which is disputed and which you are required to answer, and that can be answered by the simple answer yes or no.

"Finding 8. What was the actual cash value of the property

covered by the policy in suit which was destroyed by fire June 1, 1898?"

That is a disputed question and that is for you to determine what was the actual cash value at that time.

"(9.) Was consent to concurrent insurance of $1,500 endorsed on the policy in suit?"

There is no dispute about that so that is answered "No."

"(10.) Did defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?"

There is no dispute about that, so that is answered as follows:

"Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff."

"(11.) Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire
34 than the amount hereby insured shall bear to the whole insurance?"

There is no dispute about that and that is answered "Yes."

"(12.) What was the whole amount of insurance on said property at the time of the loss?"

There is no dispute about that and that is answered as follows:

"$4,000.00."

So you see there is no dispute except upon two of these propositions; the others are all answered; and you are to find upon these two propositions, the one as to whether or not the agent, Mr. Borgelt, knew of this previous insurance at the time of the issuing of this policy, and the other as to the actual cash value of the property destroyed.

The burden of proof rests upon the plaintiff to establish by a preponderance of the evidence these two propositions. By a preponderance of the testimony is not meant necessarily the greatest number of witnesses, but it is that evidence which is most convincing to your mind. If the evidence on the part of the plaintiff is more convincing, the truthfulness of it, than it is on the part of the defendant, then the preponderance of evidence is established. If it is not the most convincing, if the evidence is equally balanced to your minds that it is the same upon one side as it is upon the other, equally balanced, so as to leave an uncertainty, then the proof is not established by a preponderance of the testimony.

And the same way the burden is upon the plaintiff to establish by a preponderance of the evidence the value of the property.

Now, in determining the actual cash value of the property the parties provided in the policy how that was to be done, as follows:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured

to repair or replace the same with material of like kind and quality."

That is the manner in which they have agreed to determine what was the actual cash value, taking the property and deducting the proper amount for depreciation, and in no event is it to exceed what it would cost to replace the property in the same condition it was at the time of the fire and the loss.

35 Now, the credibility of the witnesses is a matter for you to determine. In determining the credibility, when you come to the testimony of any of the witnesses you are to take into consideration their demeanor upon the witness stand, their candor, the fairness with which they give their testimony, their interest or want of interest in the result of the suit, and all of these matters, the probability or improbability of their statement, all these are matters for you to consider in determining the credibility to be given to the testimony of the various witnesses.

I do not see how I can enlighten you further or say anything that would aid you in arriving at a correct conclusion on these two propositions left for your consideration. When you have agreed you will write in your answers and have your foreman sign above where I have written the word "foreman." The parties have consented that you may take this transcript of the record from the State court which contains here the list of the items. I have withdrawn from your consideration the item designated by pencil marks on each side, so you will have no difficulty in finding it.

It is the only one that is designated by pencil marks. It is the item of "chemicals and furniture in laboratory." That item is a matter you are not to take into consideration, as the court decides that it is not covered by the policy.

You can retire in charge of a bailiff.

On December 20, 1898, said jury returned their findings to the court as follows:

In United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY, Defendant.

The jury are instructed to find upon the following questions:

Finding 1. Did the defendant issue to plaintiff the policy of fire insurance mentioned and described in plaintiff's petition?

Answer. Yes.

Finding 2. Was the property covered by said policy of insurance burned on or about June 1, 1898?

Answer. Yes.

Finding 3. Did the plaintiff on or about July 26th, 1898, furnish the defendant with proofs of the loss of said property by fire?

Answer. Yes.

36 Finding 4. Did the policy issued to the plaintiff by the defendant contain the following provisions:

"This entire policy (—) otherwise provided by agreement endorsed thereon or added thereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And did said policy contain the following provision:

"This policy is made and accepted subject to the foregoing stipulations and conditions together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Answer. Yes.

Finding 5. Was there at the time of the issuance of the policy in suit, other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of the defendant company to issue policies of insurance and how are his powers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire-insurance risks in its behalf and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. D. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

Finding 8. What was the actual cash value of the property covered by the policy in suit which was destroyed by fire June 1, 1898?

37 Answer. ($4,140.00) four thousand one hundred and forty dollars.

Finding 9. Was consent to concurrent insurance of $1,500 indorsed on the policy in suit?

Answer. No.

Finding 10. Did the plaintiff tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by plaintiff.

Finding 11. Did the policy sued on contain the following provision:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance."

Answer. Yes.

Finding 12. What was the whole amount of insurance on said property at the time of the loss?

Answer. $1,000.00.

N. H. MEEKER, *Foreman.*"

Whereupon afterwards and on December 22nd, 1898, the defendant moved for judgment in its favor upon the findings of the jury and on the same day the plaintiff moved for judgment in its favor upon the findings and special verdict of the jury; and thereupon afterwards and on January 14th, 1899, the motion of the plaintiff for judgment upon the findings of the jury aforesaid was sustained and the defendant excepted and the motion of defendant for judgment in its favor upon said findings was overruled and the defendant excepted thereto; and afterwards, on February 6th, 1899, the defendant by leave of court filed its petition for a new trial; and thereupon thereafter the said cause was submitted to the court for its ruling and judgment upon said defendant's motion to set aside the special findings, verdict and judgment therein.

It is stipulated by and between the parties hereto that the foregoing bill of exceptions contains all the evidence offered or given in said cause and is a true bill of exceptions and may be allowed by the court as such in this cause.

Feb'y 23, 1899.

HALLECK F. ROSE,
Attorney for Plaintiff.
GREENE & BRECKENRIDGE,
Attorneys for Defendant.

38 And now on this 25th day of February, 1899, the foregoing bill of exceptions is duly allowed by me and ordered to be made a part of the records in this cause.

W. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon, afterwards, to wit: on the 2nd day of March, 1899, assignment of errors was filed in said case, which said assignment of errors is in words and figures following, to wit:

United States Circuit Court of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Now comes The Northern Assurance Company of London, the above-named defendant and plaintiff in error, and assigns the following errors in the record and proceedings in the above-entitled cause as follows:

1. The court erred in overruling the defendant's motion at the close of all evidence for an instruction to the jury to return a verdict in favor of defendant.
2. The court erred in overruling the motion of the defendant for judgment upon the findings of the jury.
3. The court erred in sustaining the motion of the plaintiff for judgment upon the findings of the jury.
4. The court erred in rendering judgment in favor of the plaintiff and against the defendant.

Wherefore, the defendant and plaintiff in error prays for a reversal of the said judgment and for such relief as it is of right entitled to have.

CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Attorneys for Defendant and Plaintiff in Error,
Northern Assurance Company of London.

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards, to wit, on said 2nd day of March, 1899, petition for writ of error and order allowing same was filed in said case, which said petition is in words and figures following, to wit:

39 United States Circuit Court, District of Nebraska.

GRAND VIEW BUILDING ASSOCIATION, Plaintiff,
v.
NORTHERN ASSURANCE COMPANY OF LONDON, Defendant.

Petition for Allowance of Writ of Error.

To the honorable judges of the circuit court of the United States for the district of Nebraska:

The defendant in the above-entitled cause, conceiving itself aggrieved and prejudiced in various orders and rulings of the court in said cause, and alleging divers grievous and prejudicial errors of the court in making such orders and rulings, files herewith an assignment of the errors complained of and prays for an allowance of a writ of error in said cause to the United States circuit court of appeals for the eighth circuit, and that a transcript of the records and proceedings, duly authenticated, be sent to the said court.

NORTHERN ASSURANCE COMPANY
OF LONDON,
By CHARLES J. GREENE AND
RALPH W. BRECKENRIDGE,
Its Attorneys.

On to wit, this 25th day of February, 1899, it is ordered that a writ of error be allowed as prayed for and supersedeas bond is fixed at the sum of $3,500.00 *dollars.*

W. H. MUNGER,
United States District Judge.

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

Thereupon afterwards *to wit, on the 2nd day of March*, 1899, bond was filed in said case, which said bond is in words and figures following, to wit:

Know all men by these presents, that we, Northern Assurance Company of London and Frederick H. Davis, are held and firmly bound unto Grand View Building Association, in the full and just sum of thirty-five hundred dollars, to be paid to the said Grand View Building Association, its successors or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas, lately at the November term A. D. 1898, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between Grand View Building Association, plaintiff, and Northern Assurance Company of London, defendant, judgment was rendered against the said Northern
40 Assurance Company of London, and the said Northern Assurance Company of London, *has* obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Grand View Building Association citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now the condition of the above obligation is such, that if the said Northern Assurance Company of London shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

NORTHERN ASSURANCE COMPANY
OF LONDON, [SEAL.]
By GREENE & BRECKENRIDGE, [SEAL.]
Its Attorneys.
FREDERICK H. DAVIS. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
WM. H. MUNGER, *Judge.*

Indorsed: Filed Mar. 2, 1899. Oscar B. Hillis, clerk. No. 285, "T." United States circuit court, district of Nebraska. Grand

View Building Association *vs.* Northern Assurance Company of London. Bond, $3,500.00.

Thereupon afterwards, to wit, on the 2nd day of March, 1899, a writ of error was issued and filed in said case, and a certified copy of such writ of error filed and lodged in the clerk's office, by the plaintiff in error for the defendant in error, and a citation duly signed and returned and filed on the 2nd day of March, 1899, with proof of service endorsed thereon. The following are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1898, thereof, between Grand View Building Association and Northern Assurance Company of London, a manifest error hath happened, to the great damage of the said Northern Assurance Company of London, England, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be
41 therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, on or before the 26th day of April, 1899, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 2nd day of March, in the year of our Lord one thousand eight hundred and ninety-nine. Issued at office in the city of Omaha, Nebraska, with the seal of the circuit court of the United States for the district of Nebraska, dated as aforesaid.

Seal United States Circuit Court, District of Nebraska.

OSCAR B. HILLIS,
Clerk Circuit Court United States, District of Nebraska.

Allowed by—
W. H. MUNGER, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit, a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court, District of Nebraska.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court, at office in the city of Omaha, this 31st day of March, A. D. 1899.

OSCAR B. HILLIS,
Clerk of said Court.

No. 285, "T." United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company. Writ of error to the circuit court of the United States for the district of Nebraska. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

42 The United States of America to Grand View Building Association, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Northern Assurance Company, of London, (England), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable William H. Munger, judge of the circuit court of the United States for the district of Nebraska, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

WM. H. MUNGER,
United States District Judge for the District of Nebraska.

I hereby accept service of the within citation this 27th day of February, 1899, for and on behalf of Grand View Building Association.

HALLECK F. ROSE,
Attorney for Plaintiff and Defendant in Error.

No. 285, T. United States circuit court, district of Nebraska. Grand View Building Association *vs.* Northern Assurance Company of London. Citation. Filed Mar. 2, 1899. Oscar B. Hillis, clerk.

UNITED STATES OF AMERICA, *District of Nebraska*, } ss:

Pursuant to the foregoing writ of error and in obedience thereto, I, Oscar B. Hillis, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing pages from one (1) to fifty-nine (59) inclusive, contain true and faithful transcripts of all the pleadings, process and proceedings of record and on file in said court, in the case of Grand View Building Association *vs.* The Northern Assurance Company of London, England, No. 285, docket "T," and that copies of the writ of error and citation duly certified have been lodged and remain in my said office as such clerk.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said circuit court, at Omaha in said district, this 31st day of March, A. D. 1899.

OSCAR B. HILLIS, *Clerk.*

[Cancelled 10-c. U. S. rev. stamp.]

Filed Apr. 10, 1899.

JOHN D. JORDAN, *Clerk.*

43 (*Appearance for Plaintiff in Error.*)

And on the eleventh day of April, A. D. 1899, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE CO., Plaintiff in Error, *vs.* GRAND VIEW BUILDING ASSOCIATION. } No. 1248. December Term, 1898.

The clerk will enter *my* appearance as counsel for the plaintiff in error.

CHARLES J. GREENE.
RALPH W. BRECKENRIDGE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1898. No. 1248. Northern Assurance Company, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed Apr. 11, 1899. John D. Jordan, clerk. Charles J. Greene, Ralph W. Breckenridge, counsel for pl'ff in error.

(*Appearance for Defendant in Error.*)

And on the twenty-ninth day of May, A. D., 1899, an appearance of counsel for defendant in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error, *vs.* GRAND VIEW BUILDING ASSOCIATION.	No. 1248. May Term, 1899.

The clerk will enter my appearance as counsel for the defendant in error.

HALLECK F. ROSE.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1899. No. 1248. Northern Assurance Co. of London, England, plaintiff in error, *vs.* Grand View Building Association. Appearance. Filed May 29, 1899. John D. Jordan, clerk. Halleck F. Rose, counsel for def't in error.

44 (*Stipulation as to Order Overruling Petition for New Trial.*)

And on the thirtieth day of June, A. D. 1899, a stipulation as to order overruling petition for new trial was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error, *v.* GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.	No. 1248. Stipulation.

Come now the parties hereto and stipulate that the petition for a new trial filed with leave of court on February 6, 1899, and referred to on page 37 of the printed record herein, was duly overruled, and both parties hereto waive any point which either might make upon the printed record as it stands that the judgment herein sought to be reversed is not shown by the printed record to be final because of the pendency of the petition for a new trial.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By GREENE & BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION, *Defendant in Error,*
By HALLECK F. ROSE, *Its Attorney.*

(Endorsed:) No. 1248. United States circuit court of appeals, eighth circuit. Northern Assurance Company of London, England, pl'ff in error, *v.* Grand View Building Association, def't in error. Stipulation as to order overruling petition for new trial. Filed Jun- 30, 1899. John D. Jordan, clerk. Greene & Breckenridge, attorneys for pl'ff.

(*Order of Submission.*)

And on the eleventh day of December, A. D. 1899, in the
45 record of the proceedings of said circuit court of appeals, is an order of submission of said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *December* 11, 1899.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
vs.
THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Ralph W. Breckenridge in behalf of the plaintiff in error, continued by Mr. Halleck F. Rose for the defendant in error, and concluded by Mr. Ralph W. Breckenridge for the plaintiff in error.

Thereupon the cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Opinion.*)

And on the twenty-sixth day of March, A. D. 1900, an opinion of said United States circuit court of appeals was filed in said cause in the following words, to wit:

46 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error,
vs.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.
No. 1248. December Term, A. D. 1899.

In error to the circuit court of the United States for the district of Nebraska.

Mr. Ralph W. Breckenridge (Mr. Charles J. Greene was with him on the brief) for plaintiff in error.

Mr. Halleck F. Rose for the defendant in error.

Before Caldwell, Sanborn, and Thayer, circuit judges.

THAYER, circuit judge, delivered the opinion of the court:

The general question which arises in this case is whether an insurance company should be permitted to take advantage of a con-

dition contained in one of its policies, to avoid the payment of a loss that has been sustained thereunder, when it appears that the fact rendering the policy void by the terms of the condition which is pleaded as a defense was an existent fact known to the insurer at the time it issued its policy and accepted the premium, which for that reason rendered the policy void, if at all, from the moment it was delivered. The question arises in this way. The Northern Assurance Company of London, England, the plaintiff in error, insured certain household and kitchen furniture belonging to The Grand View Building Association, the defendant in error, that was situated in a certain building in the city of Lincoln, Nebraska. The policy which it issued contained the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

47 At the time the policy in suit was executed the insured property was covered to the amount of $1,500.00 by a policy issued by the Firemen's Fund Insurance Company. A jury found that an agent of the plaintiff in error by the name of A. D. Borgelt, who had authority to make contracts of insurance in its behalf and to countersign and issue its policies and collect premiums thereon, and who solicited the policy in suit—had knowledge of the existence of the policy issued by the Firemen's Fund Insurance Company at the time he issued the policy in suit, but no indorsement appears to have been made upon the policy in suit relative to the existence of the prior policy. A fire having occurred by which the insured property was totally destroyed and an action having been brought against the plaintiff in error, which was the defendant below, to recover the amount of the loss, it pleaded the aforesaid provisions of its policy and the existence of the prior insurance as a defense to the action. The verdict below was special and on the state of facts heretofore recited, which were either found by the jury or disclosed by the record, the trial court rendered a judgment against the insurer which it seeks to reverse.

The general question stated at the outset of this opinion has been answered in the negative in many well-considered decisions. It was

so answered by this court in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490; 69 Fed. Rep., 71, and the same conclusion has been reached in other circuits. Thus, in the case of London & Lancashire Fire Ins. Co. *v.* Fischer, — U. S. App., —; 34 C. C. A., 503; 92 Fed. Rep., 500 (decided by the circuit court of appeals of the sixth circuit), it was said to be "well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or incumbrances without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company with authority to deliver or withhold policies delivered the policy in question he then knew of the existence of the other insurance or the incumbrance." The same doctrine was enforced by the circuit court of appeals for the ninth circuit in the case of McElroy *v.* British American Assurance Co. of Toronto, Canada, — U. S. App. —; 36 C. C. A., 615; 94 Fed. Rep., 990, wherein it appeared that an agent of an insurance company had issued a policy with knowledge of an existing incumbrance on the insured property and had failed to endorse the fact on the policy, although it contained a provision in substance that it should be void if there was a mortgage on the property unless the consent of the insurer thereto was shown by a written endorsement on its policy. It was also held by the circuit court of appeals for the fourth circuit in the case of Glover *v.* National Fire Insurance Company of Baltimore, — U. S. App., —; 30 C. C. A., 95; 85 Fed. Rep., 125, that the fact that the insured property was erroneously described as a "dwelling-house" when it should have been described as a "Keely Institute," which would have rendered it a more hazardous risk—would not avail the insurer as a defense to its policy when a loss had occurred, it appearing that the agent of the insurance company had knowledge of the misdescription when he solicited the risk and issued the policy. And in Putnam *v.* Commonwealth Ins. Co., 4 Fed. Rep., 753, Judge Blatchford held, after a careful review of the authorities, that an insurance company could not take advantage of a provision in its policy rendering it void if there was other concurrent insurance not
48 endorsed thereon, when it was proven that its soliciting agent had knowledge of existing insurance on the insured property to the amount of $6,000 at the time he issued its policy and only endorsed thereon permission to carry other concurrent insurance to the amount of $3,000.00.

The point now under consideration has been adjudicated so frequently that it is doubtless unnecessary to do more than refer to the cases already mentioned and the authorities therein cited. We will call attention, however, to the fact that the doctrine as heretofore stated has the approval of the supreme court of the State of Nebraska, from which State this case comes, and is also stated and reinforced by numerous citations by the leading text-writers on the law of insurance. Home Fire Ins. Co. of Omaha *v.* Hammang Bros. & Co., 44 Neb., 566; Joyce on Insurance, sec. 515; Ostrander on Fire Insurance, sec. 243; May on Insurance, 2nd ed., sec. 497. The doctrine in question rests upon the ground that facts made

known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies and collect premiums, is the knowledge of his principal and that a fraud would be perpetrated if an insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon with knowledge of facts which under its provisions rendered it void *ab initio*. To prevent the perpetration of such frauds the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which in the light of known facts rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision or that through accident or mistake it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid.

It is contended, however, in behalf of the insurer that by virtue of the conditions of its policy above quoted the rule of law heretofore stated is inapplicable to the case in hand. It is said, in substance, that no provision of its policy as printed and delivered to the insured can be denied its legitimate force and effect except by virtue of a written indorsement on the policy; that the insurance company has effectually deprived itself of the power to waive any of the conditions of its policy except by a written indorsement thereon, and that it has succeeded in framing a contract which is wholly exempt from the equitable doctrine of estoppel and waiver. This court decided, however, in Firemen's Fund Insurance Co. *v.* Norwood, 32 U. S. App., 490, 499; 69 Fed. Rep., 71, that "parties to contracts cannot disable themselves from making a contract allowed by law in any mode in which the law allows contracts to be made," and that "a written contract may be changed by parol and a parol one changed by a writing despite any provision in the contract to the contrary;" and the law to that effect is, as we think, well established by the authorities there cited as well as by other authorities that are referred to in Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 261. It has also been held that such clauses as those that are relied upon by the insurer to deprive itself of the power to contract otherwise than by some writing, should be given effect, if it all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument and that they should not be considered as having relation to acts done by the company or its agents at the inception of the contract which are sufficient, notwithstanding provisions that it may contain, to render it valid through the operation of the
49 doctrine of estoppel or waiver. Walsh *v.* Hartford Fire Ins. Co., 73 N. Y., 5, 11; Woodruff *v.* Imperial Fire Ins. Co. of London, England, 83 N. Y., 134, 141; Mutual Benefit Life Ins. Co. *v.* Robison, 19 U. S. App., 266, 274; 58 Fed. Rep., 723, 728. When an insurance company delivers a policy and accepts the premium thereon it is presumed that its intention is to make a contract which, in the light of all facts then known to it, will afford indemnity and it is beyond its power, by any provision that may be found in its

policy, to overcome the force of that presumption or to avoid the effect of acts or declarations which from an equitable standpoint are sufficient to raise an estoppel *in pais*. Thus, in the case of Wood *v.* American Fire Ins. Co., 149 N. Y., 382, it appeared that an agent of the insurance company issued a policy with knowledge of a fact which under its terms rendered it void *ab initio*, but notwithstanding the fact that the policy in suit was a standard policy which contained conditions similar to those that are invoked in the case at bar, it was held that the condition under which the forfeiture was asserted must be regarded as having been waived, as otherwise the insurer would be put in the attitude of accepting a premium for a policy which was known at the time to be of no force and effect. The court said, in substance, that it had long been settled that general agents of an insurance company may waive stipulations and provisions contained in a policy with respect to the conditions upon which it shall have inception and go into operation as a contract, by delivering it with knowledge of all the facts and receiving the premium. A similar ruling was made in Robbins *v.* Springfield Fire Ins. Co., 149 N. Y., 477, where a policy was issued by the agent of an insurance company with knowledge of the existence of an incumbrance on the insured property, which fact was not indorsed in writing on the policy as it should have been by the terms thereof to render it operative. The policy in that case contained a provision to the effect that no officer, agent or other representative of the company should have power to waive any condition or provision thereof, except such as might by the terms of the policy be indorsed thereon or added thereto, and that no such officer or agent should be deemed to have waived any provision of the policy unless the waiver was written thereon. Nevertheless, it was ruled that the insurance company had either waived the condition rendering the policy void or was estopped by the conduct of its agent from pleading the condition and the existence of the incumbrance as a defense. And in the case of Farnum *v.* Phœnix Ins. Co., 83 Cal., 246, 259, it was also held, in substance, that an insurance company was estopped from denying that one of its policies had taken effect when it appeared that it had been delivered by one of its agents who had power to deliver policies and who had extended credit for the premium by an oral agreement, although the policy contained a provision that the company should not be liable thereon until the premium was paid and a further provision that nothing less than a specific agreement indorsed on the policy should operate as a waiver of any of its provisions.

We are of opinion, therefore, that the delivery by the agent of the insurance company of the policy in suit with knowledge at the time of the existence of the prior insurance estops the insurer from pleading the prior insurance as a defense. Its agent by whom the delivery of the policy was made had power to deliver it and collect the premium and to receive notice of any existing insurance. In doing these acts he was for the time being the company and no obligation rested on the insured to insist that the existence of the outstanding insurance should be indorsed on the policy

in suit if the insurer, with knowledge of its existence, did not elect to do so but delivered the contract without such indorsement. He had the right to assume because of the delivery of the policy under the circumstances aforesaid that the insurer had determined to accept the risk notwithstanding the other insurance.

The point seems to be made in the brief that the plaintiff below in its petition and reply pleaded a waiver and that the judgment below cannot be supported because it is founded on estoppel. With reference to this suggestion it is only necessary to say that the plaintiff pleaded the facts and circumstances under which the policy was issued and the knowledge possessed by the insurer at the time, substantially as hereinbefore set forth, and in view thereof alleged that the defendant company had not only *waived* the provision of its policy on which it relied as a defense but was also *estopped* from asserting it. We perceive no error in this method of pleading, nor was any exception taken thereto in the trial court.

Judgment below is accordingly *affirmed*.

SANBORN, *Circuit Judge*, dissenting:

The question which this case presents has long been the subject of conflicting decisions. In Carpenter *v.* Providence Washington Ins. Co., 16 Pet., 495, 496, 511, the policy contained this stipulation: "And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned in or endorsed upon the policy, then this insurance shall be void and of no effect." There was other insurance upon the property at the time this policy was issued. Mr. Justice Story expressed the unanimous opinion of the supreme court upon the question in controversy in this case in these words: "The third instruction prayed the court to instruct the jury, that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury, that at law, whatever might be the case at equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect." This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. Union National Bank *v.* German Ins. Co., 34 U. S. App., 397, 402; 18 C. C. A., 203, 206; 71 Fed. Rep., 473, 476; United Fire-

men's Ins. Co. *v.* Thomas, 53 U. S. App., 517, 521; 27 C. C. A., 42, 44; 82 Fed. Rep., 406, 408.

51 A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for *the seventh circuit* are right and for the following reasons:

1. If the solicitor of this company had had unlimited power to act for it, had known of the prior insurance and had made a parol agreement or representation before or at the time of the delivery of the policy that the policy should be valid without the indorsement of the permission to carry the prior insurance, that agreement or representation would have been futile and the written stipulation that the policy was void without the indorsement would have prevailed over the parol contract under the familiar rule that all prior and cotemporaneous oral negotiations are merged in the written agreement. Since the decision in Firemen's Fund Ins. Co. *v.* Norwood, to which the writer has never assented, this court has frequently held that no representation, promise or agreement made, or opinion expressed in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the plain provisions and just interpretation of the written contract. Insurance Co. *v.* Henderson, 32 U. S. App., 536, 540, 543, 547; 16 C. C. A., 390, 391, 393, 395; 69 Fed. Rep., 762, 764, 766; New York Life Ins. Co. *v.* McMaster, 57 U. S. App., 638, 648–652; 30 C. C. A., 532, 538–540; 87 Fed. Rep., 63, 69–72; Insurance Co. *v.* Mowry, 96 U. S., 544, 547; Assurance Co. *v.* Norwood, 57 Kan., 610, 611, 613; 47 Pac., 529, 530, 532; Association *v.* Kryder, 5 Ind. App., 430, 435; 31 N. E., 851; Union National Bank *v.* German Ins. Co., 34 U. S. App., 397; 18 C. C. A., 203; 71 Fed., 473; Insurance Co. *v.* Teter, 136 Ind., 672, 673, 676, 679; 36 N. E., 283; Burt *v.* Bowles, 69 Ind., 1; Clodfelter *v.* Hulett, 72 Ind., 137; Hudson Canal Co. *v.* Pennsylvania Canal Co., 8 Wall., 276, 290; Insurance Co. *v.* Lyman, 15 Wall., 664; Pearson *v.* Carson, 69 Mo., 550; Insurance Co. *v.* Neiberger, 74 Mo., 167; Lewis *v.* Ins. Co., 39 Conn., 100. As a prior or cotemporaneous oral agreement that the policy should be valid without the indorsement of the prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect.

Moreover, this stipulation of the policy is a wise and salutary one and it ought to be enforced. Its purpose is to prevent fraud and perjury by reducing to writing the entire agreement of the parties relative to the amount of indemnity upon the property insured and, if enforced, it admirably accomplishes that object. A refusal to enforce it or any evasion of it throws wide the door to fraud and perjury and practically deprives the insurance companies of their right to contract for a limitation of the amount of insurance on the property. For if that limitation may be avoided by testimony that some agent knew of the existence of other insurance which was not indorsed the temptation to find such testimony will often be great

and there is no way in which the companies can protect themselves against its discovery. "A company which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence and by this the insured has assented to be bound." Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Hale *v.* Mechanics' Ins. Co., 6 Gray, 169; Worcester Bank *v.* Hartford Ins. Co., 11 Cush., 265.

52 2. The solicitor of the insurance company had no authority by oral agreement, by knowledge, by waiver, by estoppel, or in any other way to make a valid contract of insurance here without the indorsement upon the policy of the permission to carry the prior insurance and the insured knew that he had no such authority when it took its policy.

It is an established principle of the law of agency that a principal may limit the powers of his agent and that all parties who deal with the agent with knowledge of the limitation are bound by it. The insurance company had the right under this rule to limit the power of its solicitor to consent to other insurance to a written consent indorsed on the policy and it had the right to limit his power to deliver valid policies to those upon which all other existing insurance was indorsed in writing. The company made these limitations upon the powers of this solicitor by the express terms of its policy and the insured by accepting the policy was not only charged with knowledge of the existence of these limitations but it expressly agreed to their terms and their effect. It was beyond the powor of the solicitor to deliver any valid policy upon which the concurrent insurance was not endorsed and the insured knew it and agreed that any policy he should so deliver should be void when it received it. This policy was of that character and was consequently void. "When a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority and the consent or act of the agent not so endorsed is void." Quinlan *v.* Ins. Co., 133 N. Y., 356, 364; Walsh *v.* Hartford Fire Ins. Co., 5, 10; Marvin *v.* Universal Life Ins. Co., 85 N. Y., 278, 283; Moore *v.* H. F. Ins. Co., 141 N. Y., 219, 224; Kyte *v.* Commercial Union Assurance Co., 144 Mass., 43, 46; Ruthven *v.* American Fire Ins. Co., 60 N. W. (Iowa), 663, 666; Insurance Co. *v.* Gibbons, 43 Kan., 15; 22 Pac., 1010; Cleaver *v.* Traders' Ins. Co., 39 N. W. (Mich.), 571; Weidert *v.* State Ins. Co., 24 Pac. (Ore.), 242; Smith *v.* Niagara Fire Ins. Co., 15 Atl. (Vt.), 353; Hankins *v.* Rockford Ins. Co., 35 N. W. (Wis.), 34; Gould *v.* Ins. Co., 51 N. W. (Mich.), 455; Clevenger *v.* Ins. Co., 3 N. W. (Dak.), 313; Enos *v.* Ins. Co., 8 Pac. (Cal.), 379; Gladding *v.* Ins. Co., 66 Cali., 6; Northwestern National Ins. Co. *v.* Mize, 34 S. W., 670. "When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured so as to change the conditions of the policy or to dispense with the performance of any essential requisite contained therein

either by parol or writing and the holder of the policy is estopped by accepting the policy from setting up or relying upon powers of the agent in opposition to limitations and restrictions in the policy." Cleaver *v.* Traders' Ins. Co., 65 Mich., 527; 32 N. W., 660, 663.

3. No fraud was perpetrated on the insured in this case, for there could have been no fraud without deceit, and the insured was not deceived. It knew that there was other insurance upon the property and it knew that the solicitor of the company had no power to deliver a valid policy unless the concurrent insurance was indorsed upon it and it agreed with the company that any policy
53 which this solicitor should deliver should be void if the concurrent insurance was not indorsed. The insured was therefore neither deceived nor defrauded. It is the insurance company that was deceived and the insurance company that is defrauded, if it is compelled to pay this indemnity. Its agent acting without authority and the insured who knew he had no authority make a void contract and agree that it shall be void and then by the plea of a waiver that was never intended and an estoppel that did not exist seek to charge the company with the penalty of their conspiracy or carelessness.

There seems to me to be no ground for a waiver by, or an estoppel of the insurance company in this case for several reasons, (1) because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy and it brought notice of this limitation home to the insured by an express stipulation in the policy which the insured accepted, (2) because an indispensable element of an estoppel is some act, statement or representation which tends to deceive the insured and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and this case contains no such element. The insured knew that there was other insurance. It knew that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement and it knew that it agreed that without this indorsement its policy should be void, for all these things were written in the contract and the insured was charged with knowledge of its contents, (3) because there can be no waiver without an intent to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and delivered at the time, (4) because no estoppel or waiver based on acts or knowledge prior to or contemporaneous with the making of an express written agreement on the subject can prevail over the express terms of that contract which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. Insurance Co. *v.* Mowry, 96 U. S., 547, 548; United Firemen's Ins. Co. *v.* Thomas, 82 Fed., 409.

In my opinion the judgment below should be reversed and judgment should be entered for the insurance company.

Filed March 26, 1900.

54 (*Judgment.*)

And on the twenty-sixth day of March, A. D. 1900, in the record of the proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1899.

MONDAY, *March* 26, 1900.

THE NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, Plaintiff in Error,
vs.
THE GRAND VIEW BUILDING ASSOCIATION.

In error to the circuit court of the United States for the district of Nebraska.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Nebraska and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that the Grand View Building Association have and recover against the Northern Assurance Company of London, England, the sum of twenty dollars for its costs herein, and have execution therefor.

March 26, 1900.

55 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-four pages contain full, true, and complete copies of all the pleadings, proceedings, and record entries, including the opinion of said circuit court of appeals, in the case of Northern Assurance Company of London, England, plaintiff in error, *vs.* Grand View Building Association, defendant in error, No. 1248, as full, true, and complete as the same remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Louis, Missouri, this twenty-eighth day of April, A. D. 1900.

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

56 United States Circuit Court of Appeals, Eighth Circuit.

NORTHERN ASSURANCE COMPANY OF LONDON, England, Plaintiff in Error,
v.
GRAND VIEW BUILDING ASSOCIATION, Defendant in Error.
} No. 1248. Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the entire record in the above-entitled cause in the circuit court of appeals, which was filed by the above-named plaintiff in error in the Supreme Court of the United States with its petition to said Supreme Court for a writ of certiorari requiring said cause to be certified to said Supreme Court for its review and determination under section 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on Monday, May 21, 1900, in the said case of Northern Assurance Company of London, England, plaintiff in error, *v.* Grand View Building Association, defendant in error, and the clerk of the said United States circuit court of appeals for the eighth circuit is hereby requested to send up to the said Supreme Court of the United States a copy of this stipulation as his return to said writ of certiorari.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, *Plaintiff in Error,*
By CHARLES J. GREENE,
RALPH W. BRECKENRIDGE, *Its Attorneys.*
GRAND VIEW BUILDING ASSOCIATION,
By HALLECK F. ROSE, *Its Attorney.*

57 Endorsed: U. S. circuit court of appeals, eighth circuit. Northern Assurance Co. of London, England, pl'ff in error, *v.* Grand View Building Ass'n, def't in error. Stipulation as to clerk's return to writ of certiorari. Filed May 26, 1900. John D. Jordan, clerk.

A true copy.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Northern Assurance Company of London, England, is plaintiff in error and Grand View Building Association is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Nebraska, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into
59 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of May, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

60 [Endorsed:] File No., 17,753. Supreme Court of the United States. No. 639, October term, 1899. Northern Assurance Company of London, England, *vs.* Grand View Building Association. Writ of certiorari and return. Filed May 26, 1900. John D. Jordan, clerk. Filed May 29, 1900. J. H. McK., cl'k.

Return to Writ.

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of The Northern Assurance Company of London, England, plaintiff in error, *vs.* The Grand View Building Association is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office, in St. Paul, Minnesota, this twenty-sixth day of May, A. D. 1900.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

MAY 10 1900
JAMES H. McKENNEY,
Clerk

No. 639. 2x6 6.

Bk. of Greene v. Breckenridge for

639

Petitioner.

Filed May 10, 1900.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

LEW. W. GAGE, Printer, Omaha.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Northern Assurance Company of London, England, shows unto your Honors the following facts:

1. On August 30th, 1898, (printed record, pp. 1 and 9) respondent, a corporation created under the laws of Nebraska, brought suit against petitioner a corporation created under the laws of the Kingdom of Great Britain and Ireland, in the district court of Lancaster county, Nebraska, claiming judgment against petitioner for twenty-five hundred dollars with interest thereon at seven per cent per annum from July 26th, 1898, upon a policy of insurance covering certain property alleged to have been destroyed by fire.

2. On September 29th, 1898, (printed record p. 15)

your petitioner procured an order in the said district court of Lancaster county, Nebraska, removing the said cause to the circuit court of the United States for the district of Nebraska on the ground of the diverse citizenship of the parties thereto.

3. Issues were duly joined and said cause came on for trial in the circuit court of the United States for the district of Nebraska on December 19, 1898, before the court and a jury and a special verdict was therein returned. (pp. 19, 20.)

4. On December 22nd, 1898, each party moved the court for a judgment in its favor respectively upon the findings of the jury (p. 21,) the court overruled the motion of petitioner, sustained the motion of respondent, and entered judgment against your petitioner and in favor of respondent for twenty-five hundred dollars with interest at seven per cent per annum from September 26th, 1898, and costs. (p. 22.)

5. Your petitioner prosecuted a writ of error from said judgment to the United States circuit court of appeals for the eighth judicial circuit (pp. 38, 40), said cause being entitled in said circuit court of appeals, "No. 1248, Northern Assurance Company of London, England, plaintiff in error, v. Grand View Building Association, defendant in error."

6. The circuit court of appeals for the eighth circuit in its opinion in said cause (p. 45), filed in said court on March 26, 1900, by a divided court, affirmed said judgment against your petitioner.

7. A certified copy of the entire record of the said cause in the said circuit court of appeals for the eighth circuit is herewith furnished and made a part of this

application marked exhibit A in conformity with rule 37 of this Honorable court.

8. Your petitioner is advised and believes that the said judgment of the United States circuit court of appeals of the eighth circuit in said cause, is erroneous in the following particulars:

I. The policy upon which the suit was brought contains the following provision:

> "This entire policy unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the assured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And said policy also contains the following stipulation:

> "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver if any shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance in this policy exist or be claimed by the insured unless so written or attached."

By special finding 5 (p. 20), it is found that when the policy in suit was issued there was other insurance upon the insured property in the sum of fifteen hundred dollars in the Firemen's Fund Insurance Company.

By findings 6 and 7 it is found that the recording agent of your petitioner, whose authority was limited

to the countersigning and issuance of policies, the acceptance of risks, and the receipt of premiums, and who, as such recording agent issued the policy sued on, knew when said policy was issued and delivered to respondent, that there was then fifteen hundred dollars other insurance upon the insured property, which insurance was issued prior to the date thereof, and by finding 9 it is found that consent to such concurrent insurance of fifteen hundred dollars was not endorsed thereon. It is not found that petitioner was ever notified of the fact of such concurrent insurance until after the fire nor that it ever in any manner consented thereto; and the question for determination upon said special findings of the jury is whether the knowledge of petitioner's recording agent, whose powers were limited as above stated, acquired prior to the issuance and delivery of the policy containing the stipulations above quoted, of the fact of other insurance then existing upon the insured property, but not consented to by endorsement upon the policy, and which knowledge was not communicated to the company, constituted a a waiver of the conditions of the policy requiring its consent to other insurance to be endorsed in writing thereon, or estops the company to insist after the fire, that said policy was void from the date of its issue because of such other insurance not consented to in writing endorsed thereon. The circuit court of appeals of the eighth circuit erroneously held (p. 45), Circuit Judge Sanborn dissenting (p. 50), that the knowledge of the company's agent of the fact of additional insurance, although same was not consented to in writing endorsed upon the policy, as required by its terms, was a waiver of the provision thereof, requiring consent to such additional insurance to be so endorsed, and that

the knowledge of the agent of such concurrent insurance at the time he issued the policy in suit, estops petitioner to insist that same is void because of such concurrent insurance not so endorsed.

A majority of the judges of said circuit court of appeals of the eighth circuit overruled *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495, and declined to adjudge the question in harmony with that decision of this court, and with the decisions of the circuit court of appeals for the seventh circuit in *Union National Bank v. German Insurance Company*, 34 U. S. App. 397, 402, 18 C. C. A. 203, 206, 71 Fed. 473, 476, and in *United Firemen's Insurance Company v. Thomas*, 53 U. S. App. 517, 521, 27 C. C. A. 42, 44, 82 Fed. 406.

II. The verdict was special and does not find that petitioner's agent, in delivering the policy in suit, with knowledge of the other insurance, intended to waive the conditions of said policy, avoiding it for other insurance not consented to by the company in writing endorsed thereon, and the judgment upon the special verdict should, upon this ground, have been in favor of petitioner.

Wherefore your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this court directed to the United States circuit court of appeals for the eighth circuit, commanding the said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record of said circuit court of appeals in the said cause therein entitled "Northern Assurance Company of London, England, plaintiff in error, v. Grand View Building Association, defendant in error, No. 1248" to

the end that the said cause may be reviewed and determined by this court as provided by law, and that the said judgment of the said circuit court of appeals in the said cause and every part thereof may be reversed by this Honorable court, and the judgment of the circuit court for the district of Nebraska reversed and a judgment directed for your petitioner.

And your petitioner will ever pray.

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Northern Assurance Company of London, England, petitioner.

UNITED STATES OF AMERICA: }
Northern District of Illinois: } *ss.*

G. H. Lermit, being duly sworn, says he is the manager of the western department of the Northern Assurance Company of London, petitioner in the above written petition for writ of certiorari, and authorized in behalf of said petitioner to verify same; that he has read said petition and the same is true of his own knowledge, except such matters as are therein stated on belief, and as to such statements he believes it to be true.

(*Signed*) G. H. LERMIT.

Subscribed in my presence and sworn to before me this 24th day of April, 1900.

SEAL.

(*Signed*) S. W. BURNHAM,
Clerk.

Supreme Court of The United States.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

V.

GRAND VIEW BUILDING ASSOCIATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The importance of the question involved in this case cannot be measured by the amount of the judgment sought to be reversed. The insurance companies doing business throughout the United States issue annually thousands of policies containing the stipulations avoided by the judgment your Honors are asked to review, and daily face the question at issue herein, which has been the subject of a multitude of conflicting decisions, not only in the courts of the states but in the federal circuit courts and the federal circuit courts of appeals, notwithstanding the unanimous decision of this court, voiced by Mr. Justice STORY in *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495; and because some of the federal courts have refused to be bound by that decision although it is directly in point, and have *in terms repudiated* its doctrine as obsolete, while other federal courts and judges not only adhere to the doctrine of the case as the law, but follow the case itself as an authority, your Honors should re-examine the question and *yourselves* reaffirm or re-

verse the *Carpenter* case, that there may be no longer any doubt as to the rule of law which must govern, at least in the federal courts of the country, upon facts similar to those presented by the record in this case.

This application, therefore, is believed to be within not only the letter but the spirit of the rule announced by the court through Mr. Justice BREWER in *Forsyth v. City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665:

> "We reaffirm in this case the propositions heretofore announced, to wit, that the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute, would be finally determined in that court. And, further, that while this power is co-extensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and courts of a state, . . . demands such exercise."

Circuit Judge SANBORN in his dissenting opinion in this case states the disagreement between the courts in the following language:

> "The question which this case presents has long been the subject of conflicting decisions. In *Carpenter v. Providence Washington Insurance Company*, 16 Pet. 495, 496, 511, the policy contained this stipulation: 'And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed

upon the policy, then this insurance shall be void and of no effect.' There was other insurance upon the property at the time this policy was issued. Mr. Justice STORY expressed the *unanimous opinion of the supreme court upon the question in controversy in this case* in these words: 'The third instruction prayed the court to instruct the jury, that if the Washington Insurance company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed; but instructed the jury that, at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or endorsed upon the policy; otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with when there has been no such mention or endorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.'

"This decision was rendered in 1842, has never been overruled and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. *Union National Bank v. German Insurance Company*, 34 U. S. App. 397, 402, 18 C. C. A. 203, 206, 71 Fed. Rep. 473, 476; *United Firemen's Insurance Company v. Thomas*, 53 U. S. App. 517, 521, 27 C. C. A. 42, 44, 82 Fed. Rep. 406, 408.

"A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the

seventh circuit are right, and for the following reasons:"

(Here follows a statement at length of Judge SANBORN'S views upon the point in controversy. pp. 51 to 54.)

It is not deemed proper at this time, nor necessary, to cite the decisions of the state courts which are opposed to the doctrine of the majority opinion and which are in harmony with the doctrine unanimously announced by this court in 1842 in the *Carpenter* case. Some of them are referred to by Judge SANBORN. The majority opinion is grounded upon *Firemen's Fund Insurance Co. v. Norwood*, 32 U. S. App. 490, 69 Fed. 71, in which case, in the opinion by Judge CALDWELL, (Judge SANBORN dissenting) it is assumed that the doctrine of the *Carpenter* case, that the requirement of written consent cannot be waived by parol, but that consent to additional insurance must be endorsed in writing upon the policy, "has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete;" and certain decisions are therein cited, which, Judge CALDWELL claims "effectually dissipate the the doctrine" of the *Carpenter* case.

Counsel for petitioner insist that the doctrine of the case cited is not obsolete, that *not one* of the decisions of this court cited in the *Norwood* case in support of the declarations above quoted, *involves the doctrine of the Carpenter case*, and are sustained by the statement of Judge SANBORN, that the latter has never been overruled. The *Norwood* case has been followed, and the *Carpenter* case ignored, by the circuit courts of appeals for two other circuits; in the sixth circuit, in *London and Lancashire Insurance Company v. Fischer*, 34 C. C. A. 503, 92 Fed. 500, and in the ninth circuit in

McElroy vs. British American Assurance Co. of Toronto, 36 C. C. A. 615, 94 Fed. 990. This singular conflict of opinion is pronounced and irreconcilable; but when a United States circuit court of appeals declines to be bound by a decision of this court *in point*, claiming that its doctrine has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete, a situation is presented which calls for the prompt interposition of this court; it is believed to be an hitherto unheard of thing, for the federal courts to refuse conformity to a doctrine promulgated from this bench, and this court should either maintain the authority of its decisions, or admit its error.

The judgment herein also violates a settled rule of practice. *The findings of fact leave the question of waiver to be inferred as a matter of law.* It is an essential prerequisite to the rendition of a judgment upon a special verdict that *all the facts necessary* to a recovery shall be found. In the case at bar, *the fact* upon which the plaintiff's right to recovery rests, *is unsupported by any finding*, and a waiver cannot be inferred from the fact of the agent's knowledge and an estoppel tacked onto the inference of waiver.

In *Patterson v. United States*, 2 Wheat. 221, 225, your Honors held:

> "A verdict is bad if it varies from the issue in a substantial matter, *or if it find only a part of that which is in issue.* The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or special verdict, it is their duty to decide the very point in issue, and although the court in which the case is tried may give form to a general find-

> ing, so as to make it harmonize with the issue, yet, if it appear to that court, or to the appellate court, that the finding is different from the issue, *or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict.*"

See also *Suydam v. Williamson*, 20 How. 427.

The circuit court of appeals for the seventh circuit in *Wesson v. Saline County*, 73 Fed. 917, said:

> "The question for review upon a special verdict or finding is whether the facts found are sufficient to support the judgment, (Rev. St., § 700), and it is manifestly important, especially to the party having the burden of proof, that atl the facts essential to the relief sought shall be explicitly and fully stated."

The same court in *Sneed v. Sabinul Mining & Milling Co.*, 73 Fed. 925, say:

> "Care should be taken to distinguish between the finding of fact and a mere statement of evidence which tends to establish, or, it may be, establishes the fact."

And in *Daube v. P. & R. Coal & Iron Co.*, 77 Fed. 713:

> "The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof, . . . and if facts essential to that conclusion have not been found, the necessary inference is that they did not exist."

See also *United States v. Harris*, 77 Fed. 821.

Judge CALDWELL, dissenting from the majority of the circuit court of appeals for the eighth circuit, in *McMaster v. New York Life Ins Co.*, 99 Fed. 856, 887, says:

> "The rule is absolute and without an exception that the special findings of fact of the lower court must dis-

tinctly and specifically find every fact essential to support its judgment. *Nothing can be supplied by intendment.*"

Judge SANBORN, in his dissenting opinion in this case (p. 54) says:

"There can be no waiver without an intent to waive and *no intent to waive can be deduced or inferred from the mere fact of knowledge* in the face of express written stipulation to the contrary made and delivered at the time."

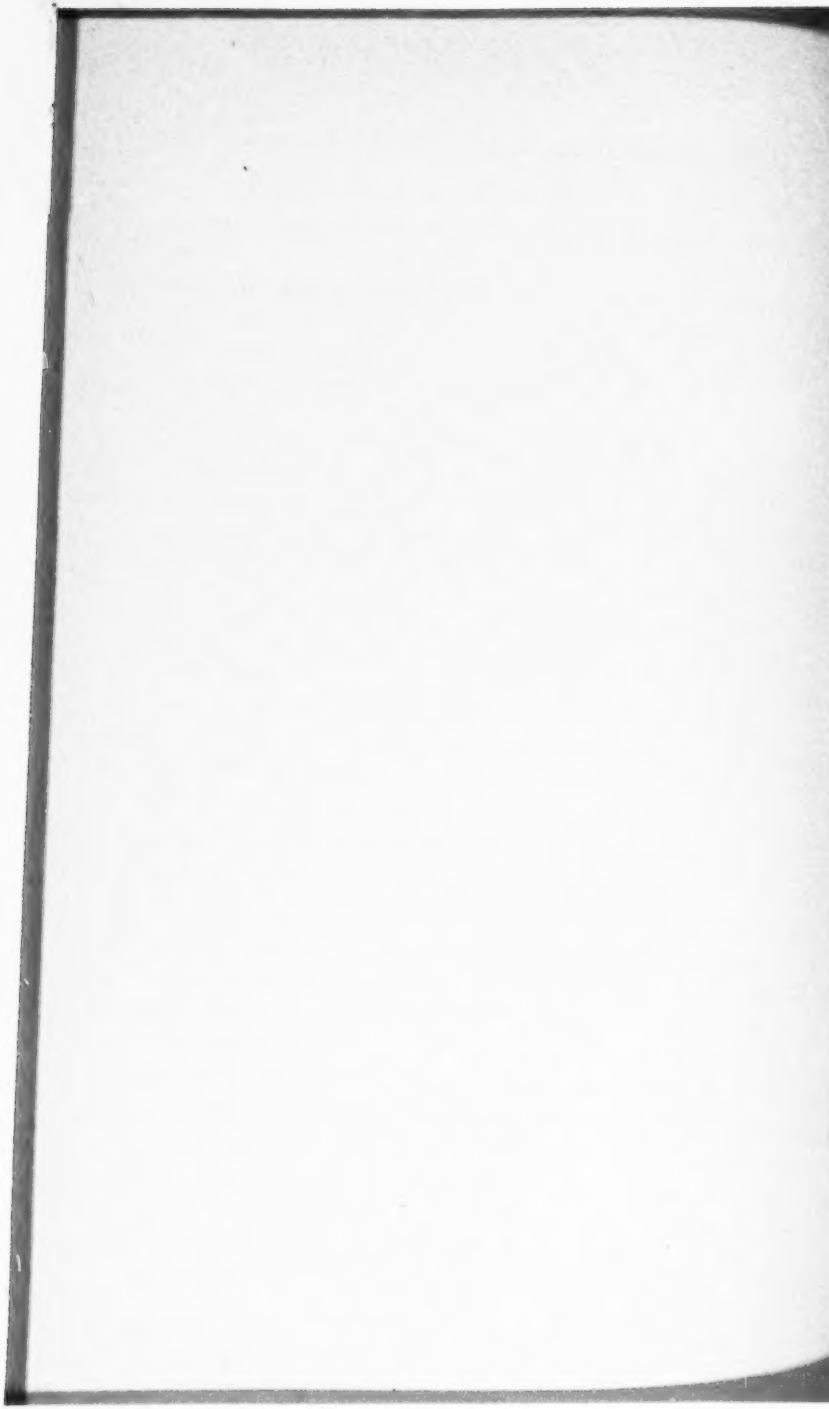
Circuit Judge JENKINS of the circuit court of appeals for the seventh circuit in *United Firemen's Insurance Co. v. Thomas*, 82 Fed. 406, uses substantially the same language.

There is a conflict upon this point between the judgment in this case of the circuit court of appeals for the eighth circuit upon the one hand, and this court and the circuit court of appeals for the seventh circuit and Judge SANBORN on the other.

It is, therefore, respectfully submitted that the great importance of the question of insurance law involved, and the conflict between this court and the circuit court of appeals for the eighth circuit, and between the circuit courts of appeals for the seventh and eighth circuits, and the lack of harmony among the judges of the circuit court of appeals for the eighth circuit, should move your Honors to issue the writ of *certiorari* herein and upon consideration with such assistance as counsel can give, settle whether or not a contract, plain in its terms, shall be enforced.

NORTHERN ASSURANCE COMPANY
OF LONDON, ENGLAND,
By CHARLES GREENE and
RALPH W. BRECKENRIDGE,
Its Attorneys.

OMAHA, May 4, 1900.



1181

No. 276.

Brief of Greene v. Northern Assurance Co.
for Petitioner

Office Supreme Court U.S.
FILED
OCT 5 1900
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

Filed Oct. 5, 1900.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF PETITIONER.

Supreme Court of the United States.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Brief and Argument of Petitioner.

STATEMENT OF THE CASE.

A policy of fire insurance contained the following stipulation:

"No officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any

privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Did the knowledge, acquired prior to the issuance and delivery of the policy containing the stipulation above quoted, of the company's recording agent, whose powers were limited to the acceptance of risks, the issuance of policies, and the collection of premiums therefor, of other insurance then existing upon the insured property, but not consented to either by indorsement upon the policy, or by agreement between the insured and the company's agent, and *which knowledge* was not communicated to the company, *constitute a waiver* of the condition of the policy providing: "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy;" *or estop* the company to insist after a fire that its policy was void from the beginning, because of such other insurance not consented to in writing indorsed thereon?

Can a judgment for plaintiff upon a special verdict which is silent upon a fact essential to recovery be sustained?

THE FACTS.

This suit was originally brought by the Grand View Building Association, a corporation created under the laws of Nebraska, and hereinafter called the insured, against petitioner, a corporation created under the laws of the Kingdom of Great Britain and Ireland, in the district court of Lancaster county, Nebraska, to recover upon a policy of insurance issued by petitioner, who removed the case to the United States circuit court for the district of Nebraska, where, in due course, it was tried. The facts upon which

this cause must be here reviewed are set forth in the special findings of the jury, (18, 19), in substance as follows:

1. Petitioner issued to insured the policy of fire insurance in suit.

2. The insured property was burned on or about June 1, 1898.

3. Proofs of loss were furnished about July 26, 1898.

4. The policy contains the provisions set forth in the opening paragraph of this brief.

5. There was, at the time of the issuance of the policy in suit, other insurance for $1,500 upon the insured property, in the Firemen's Fund Insurance Company.

6. A. D. Borgelt was recording agent of petitioner at Lincoln, Nebraska, with authority from petitioner to countersign and issue its policies and accept fire insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

7. Borgelt knew when the policy in suit was issued and delivered to insured, of the other insurance upon the insured property, which was issued prior to the date of the policy in suit, and such fact was communicated to Borgelt by or on behalf of the insured.

(This finding was upon conflicting testimony; Borgelt denies any knowledge until after the fire of the other insurance.)

8. The actual cash value of the insured property burned was $4,140.00.

9. Consent to the concurrent insurance was not indorsed on the policy in suit.

10. Petitioner, on August 4, 1898, tendered $33.75 in return of the premium paid upon the policy in suit, which was not accepted by the insured.

11. The policy in suit contained a provision that the

petitioner should not be liable thereunder for more than the proportion the amount insured should bear to the whole insurance.

12. The whole amount of insurance on the insured property at the time of the loss was $4,000.00.

At the close of all the evidence, "the defendant (petitioner) thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted." (26.)

By reference to the instructions to the jury (26), it will be observed that the only questions submitted to them were as to the facts upon which findings seven and eight are based, that is, whether petitioner's agent knew of the previous insurance at the time he issued the policy in suit, and the actual cash value of the property destroyed. When the special verdict as above summarized was returned into court, each party moved for a judgment upon the findings. (19, 20.) The motion of petitioner was overruled, and it excepted; insured's motion was sustained, and judgment rendered in its favor. (20, 21). Thereupon, afterwards, and by stipulation, a bill of exceptions was settled and filed, and petitioner sued out a writ of error to the United States circuit court of appeals for the eighth circuit, assigning (32) the following

Specifications of Error:

"1. The court erred in overruling the defendant's motion at the close of all evidence for an instruction to the jury to return a verdict in favor of defendant.

2. The court erred in overruling the motion of the defendant for judgment upon the findings of the jury.

3. The court erred in sustaining the motion of the plaintiff for judgment upon the findings of the jury.

4. The court erred in rendering judgment in favor of the plaintiff and against the defendant."

The cause was orally argued and submitted to the cir-

cuit court of appeals of the eighth circuit, on December 11, 1899, and by an opinion filed March 26, 1900, (38), Circuit Judge SANBORN dissenting (43), the judgment against petitioner was affirmed, and the case brought to this court on a writ of certiorari. (49.) The case is reported 101 Fed., 77.

ARGUMENT.

The issues between the parties to this record are sharply stated in the opening paragraph of this brief. If written agreements may be superseded by the parol negotiations which precede and induce them: if one who already has insurance can accept another policy of insurance which does not consent to other insurance, and which in terms is void in case of other insurance not consented to in writing indorsed thereon, without examination to see whether it consents to concurrent insurance: and when a fire occurs *go into a court of law*, without asking for a reformation of the policy upon which he brings suit, and by parol evidence vary the terms of the written contract which he accepted and put among his papers, and thus accomplish the legally impossible feat of establishing a waiver of the provision of his policy which defeats his recovery, by mere proof that the company's agent knew previous to the execution and delivery of the contract, of the fact which constituted a breach of the condition of the policy, viz: the existence of other insurance not consented to in writing indorsed on the policy, without even an attempt to prove any agreement with respect thereto, save that set forth in the policy itself: if the rule of evidence that a written contract cannot be varied by parol is to be abrogated: if this court shall reverse one of its own decisions exactly in point, announced by Mr. Justice STORY and concurred in by a unanimous court: if a judgment for a plaintiff based upon special findings of a jury, silent with respect to a matter essential to plaintiff's recov-

ery can be upheld: then, and not otherwise, can the opinion and judgment of the circuit court of appeals of the eighth circuit be sustained.

The propositions stated oppose "the established rule that written contracts shall prevail over the previous oral negotiations from which they result," and such attempts to abrogate the rule, the circuit court of appeals of the eighth circuit, in *New York Life Ins. Co. v. McMaster* 87 Fed. 63, 69, say, have been repeatedly presented to and have "repeatedly received the condemnation of this and other courts."

This proceeding did not even take the form of an appeal to the conscience of the court to reform the contract upon which the suit is brought, but in the severe language of JUDGE SANBORN in the case cited: "It is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them."

The decision sought to be reversed chiefly rests upon the previous decision of the circuit court of appeals of the eighth circuit in *Firemen's Fund Insurance Company v. Norwood*, 32 U. S. App., 490, 69 Fed., 71; decisions of the sixth and ninth circuits which in terms follow the *Norwood* case are also cited. These will be referred to hereinafter.

Reference is also made to the fact that the ruling of the supreme court of Nebraska, in *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566, and other cases, is in harmony with the majority opinion.

No wiser bit of congressional legislation is to be found than that which permits insurance companies created under the laws of other states and countries, to remove to the federal courts suits against them involving the jurisdictional amount, from state courts like those of Nebraska, whose conception of an insurance policy is that it is a promissory note payable in case of fire; and it was to avoid a decision

of this case agreeably to the rule of the supreme court of Nebraska in the case cited, which in terms refuses adherence in several points to doctrines firmly established by this and other courts, and to secure its decision in conformity with the principles declared in *Carpenter v. Providence-Washington Insurance Company*, 16 Pet., 495, that the case was removed from the state court.

Carpenter v. Providence—Washington Insurance Co.

Circuit Judge SANBORN in his dissent from the majority opinion in the case at bar (43), states the conflict of decisions and the pith of the decision in the *Carpenter* case as follows:

"The question which this case presents has long been the subject of conflicting decisions. In *Carpenter v. Providence-Washington Ins. Co.*, 16 Pet., 495, 496, 511, the policy contained this stipulation: 'And provided further, that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon the policy, then this insurance shall be void and of no effect.' There was other insurance upon the property at the time this policy was issued. Mr. Justice STORY expressed the unanimous opinion of the supreme court upon the question in controversy in this case in these words:

'The third instruction prayed the court to instruct the jury that if the Washington Insurance company had notice, in fact, of the existence of the policy in the American office, that 'was, in law, a compliance with the terms of the policy.' The court refused to give the instruction as prayed; but instructed the jury, that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but shou'd be mentioned in or indorsed upon the policy;

otherwise, the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said, that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.'

This decision was rendered in 1842, has never been overruled, and in 1897 the circuit court of appeals for the seventh circuit reached the same conclusion. *Union National Bank v. German Ins. Co.*, 34 U. S. App., 397, 402, 18 C. C. A., 203, 206, 71 Fed. Rep., 473, 476; *United Firemen's Ins. Co. v. Thomas*, 53 U. S. App., 517, 521, 27 C. C. A. 42, 44, 82 Fed. Rep., 406, 408.

A careful reading of the cases upon both sides of the question has forced my mind to the conclusion that the supreme court and the circuit court of appeals for the seventh circuit are right and for the following reasons:"

(Here follows a statement at length of Judge SANBORN'S views.)

The reason why many of the provisions of insurance policies are placed therein is thus stated by Mr. Justice STORY in the *Carpenter* case.

"Underwriters do not rely so much upon the principles (good faith and integrity) as upon the interest (financial) of the assured."

After a review of other considerations which are no less potent now than fifty years ago, the learned justice remarks:

"But, be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefits of the contract, which, upon reason or principle, he has no

right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations which, but for those stipulations, would not have been entered into."

The opinion further recites:

"The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they are certainly entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment."

And this court, in one of its more recent decisions, viz: *Liverpool & Great Western Steam Company v. Phenix Insurance Company*, 129 U. S., 397, speaking through Mr. Justice GRAY, say:

"On any question depending upon mercantile law and not upon local statute or usage, it is well settled that the courts of the United States are not bound by decisions of the courts of the state, but will exercise their own judgment, even when their jurisdiction attaches only by reason of the citizenship of the parties, in an action at law of which the courts of the state have concurrent jurisdiction, and upon a contract made and to be performed within the state."

And in support of the proposition last above quoted, numerous decisions of this court are referred to,—among them the *Carpenter* case.

Decisions of state courts were pressed upon this court

to induce a different decision from that unanimously reached in 1842; but with the exception of the *Norwood* case and those following it, no decisions in point can be found opposing the doctrine of the *Carpenter* case, save only such as emanate from courts who have disregarded the rules of evidence and misapplied the doctrines of waiver and estoppel.

Counsel feel that they might rest content with the citation of the *Carpenter* case, but the importance of the question involved and the sharp conflict of opinion, justify consideration of the principles upon which it rests, and of the sweeping assertion of Judge CALDWELL, which we quote from his opinion in the *Norwood* case as follows:

> "The early doctrine on this subject has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete. Among the decisions of the supreme court of the United States which effectually dissipate the doctrine of *Carpenter v. Insurance Co., supra*, attention may be called to the cases of *Insurance Co. v. Wilkinson*, 13 Wall., 222; *Insurance Co. v. Norton*, 96 U. S., 234; *Eames v. Insurance Co.*, 94 U. S., 621."

Keeping in mind the fact that the *insured*, in the case at bar, *contracted that it would not claim a waiver* of any of the provisions of the policy upon which this suit is based, *unless such waiver should be in writing indorsed upon or added thereto*, your Honors' attention is challenged to the facts of *Insurance Co. v. Wilkinson*, the first of the decisions of this court which is referred to by Judge CALDWELL as "effectually dissipating the doctrine of the *Carpenter* case."

The fact in the *Wilkinson* case was that the soliciting agent of the insurance company prepared the signed application for the policy, which contained a representation of fact, inserted without the knowledge of the applicant, and concerning which he had refused to make any statement; and it was held that the act of the agent in inserting in the

application, without the knowledge or consent of the applicant, a statement not true in fact, was the act of the company and not of the insured; and that the admission of verbal testimony to show the facts, did not contradict the written contract, on the theory that the untruth inserted by the insurance agent in the application, was not the statement of the insured.

In *Insurance Co. v. Norton*, the second of the decisions of this court cited as showing that the doctrine of *Carpenter v. Insurance Co.*, is effectually dissipated, the question was whether or not the company had waived the forfeiture of the policy for failure to pay the premium notes at their maturity. The policy in that case contained an "express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeiture," and "these terms," says Mr. Justice BRADLEY, "had the company so chosen, it could have insisted on." He further observes: "But a party always has the option to waive a condition or stipulation made in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it." Reference is made to the fact that there was evidence to show that the company had allowed its agents to take notes instead of money for premiums and to grant indulgence on these notes. The opinion recites:

> "It acquiesced in and ratified their acts in this behalf. For a long period, it allowed them to give an indulgence of ninety days; after that, of sixty; then of thirty days. It is in vain to contend that it gave them no authority to do this, when it constantly allowed them to exercise such authority, and always ratified their acts, notwithstanding the language of the written instruments."

In the third case cited by Judge CALDWELL, viz. *Eames v. Insurance Co.*, the action was in equity to compel the delivery of a contract for insurance, partly oral and partly written, upon property which was destroyed by fire before

the policy was received by the insured. An application, in which all the facts relating to incumbrances and other insurance was substantially set forth, was forwarded to the general agent of the company; and the delay in the issuance of the policy was due to a disagreement about the premium rate which was fixed by the general agent, who also in case of extra hazardous risks, such as the subject of insurance in the particular case, determined whether or not the company would write the insurance.

The decision of the point upon which the case turned, rests upon the principle announced in *Insurance Co. v. Wilkinson*, *supra*, that the act of the agent in taking the application, and who wrote the answers therein with full and exact knowledge of the actual facts (and which application had been referred to the general agent of the company in correspondence), was the act of the company itself.

Following the citation of the *Wilkinson*, *Norton* and *Eames* cases, Judge CALDWELL observes:

"The cases in this court to the same effect are *Insurance Co. v. Snowden*, 7 C. C. A., 267, 58 Fed., 342; *Insurance Co. v. Robison*, 7 C. C. A., 444, 58 Fed., 723; *Assurance Soc. v. Winning*, 58 Fed., 541, 7 C. C. A., 359, 19 U. S. App., 173."

In the *Snowden* and *Robison* cases, applications for the insurance were made to agents of the insurance companies who, with knowledge of the facts, put their own construction thereon. These cases are squarely within the principle of the *Wilkinson* case.

In the *Winning* case, the points involved as stated by Circuit Judge THAYER are as follows:

"Did the trial court err in permitting the plaintiff to show, with a view of establishing a waiver, that the defendant company had declared its intention to forfeit the policy if the premium of April 5, 1889, was not paid at maturity, and in permitting the plaintiff to further show that the

company had in fact carried that purpose into execution on May 31, 1889, by declaring the policy forfeited, and by entering it on its books, both at its home office and at its St. Louis agency, as a lapsed policy?

Secondly. Did the trial court err in refusing to charge at the conclusion of all the testimony that there was no evidence from which the jury could find that the provision relative to proofs of loss had been waived, and that the jury should accordingly return a verdict in favor of the defendants?"

With due regard for the opinion of Judge CALDWELL and his concurring associate, it is submitted that none of the cases cited as effectually dissipating the doctrine of the *Carpenter* case, involved its doctrine; and, as Judge SANBORN says in his dissenting opinion in the case at bar (44), citing many authorities:

"Since the decision in *Firemen's Fund Insurance Co. v. Norwood*, to which the writer has never assented, this court (circuit court of appeals, eighth circuit), has frequently held that no representation, promise or agreement made, or opinion expresssd in the previous parol negotiations as to the terms or legal effect of the resulting written agreement can be permitted to prevail over the plain provisions and just interpretation of the written contract. * * * As a prior or contemporaneous oral agreement that the policy should be valid without the endorsement of prior insurance could not avoid the written stipulation that it should be void, much less would the mere knowledge of both parties that the prior insurance existed without any agreement concerning it have that effect."

The quotations in the majority opinion in the *Norwood* case from *Reed v. Insurance Co.*, (R. I.,) 24 Atl., 833, are challenged as an unfair presentation of the views of the Rhode Island court. It will be observed by comparison of the opinion in the case cited with the quotation made by Judge CALDWELL, that the opinion states at considerable

length the reasons assigned for the statement: "There is much room for doubt, therefore, whether public policy requires the adoption of a rule which treats a contract of insurance differently from any other contract in writing."

Immediately following the language with which Judge CALDWELL ends his quotation is the following:

"Opposed to this line of decisions, Massachusetts has stood almost alone, with a sturdiness characteristic of the commonwealth, and the decision of this court in *Wilson v. Insurance Co.*, 4 R. I., 141, was in harmony with the Massachusetts cases."

Then follows a statement of the point involved, and of the holding of the court, in its previous decision, and the contention adverse to the conclusion reached in the *Reed* case is thus disposed of:

"Stability of decision is very important in the administration of the law, and as this doctrine has stood so long in this state, apparently without question, *and as it rests upon good reason*, and is, moreover, in line with the rule of the state under whose law both these policies were issued, we see no sufficient ground to depart from it."

Furthermore, the dissenting opinion of Judge CALDWELL himself, in *McMaster v. New York Life Ins. Co.*, 99 Fed., 856, 885, is authority for the statement that the *Norwood* case had in effect been overruled by the circuit court of appeals of the eighth circuit, before the decision in the case at bar; he says:

"In *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71, the question under discussion was decided by this court after full argument and consideration.

The opinion in that case is exactly opposed to the opinion of the majority in this case, and yet the majority opinion nowhere refers to the *Norwood* case."

In a previous decision of the circuit court of appeals of the eighth circuit, in the same case. *Insurance Co. v. Mc-*

Master, 57 U. S. App. 638, 30 C. C. A., 532, 87 Fed., 63, *supra*, the court upon an extended review of decisions of the state and federal courts, unanimously declared:

"It is useless to review other decisions. This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms and prevented the complainant from reading it."

Among the cases extensively noticed in the opinion in the case last cited which was written by Judge SANBORN, and which are cited in support of the proposition announced by the court as the settled law of the land, is *Assurance Co. v. Norwood*, 57 Kan. 610, 47 Pac. 529.

The Kansas case grew out of the same fire, and is based upon the same facts, and was brought by the same party, as the *Norwood* case decided by Judge CALDWELL; the Kansas court say:

"There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissable to contradict or vary the terms of a written contract.

Express mention is made of *Insurance Co. v. Norwood*, 69 Fed., 71; but the court with regard to it observe:

"We find ourselves unable to concur in the conclusion reached by that eminent court that 'by delivering their policies with knowledge, through their agents, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up after a loss.' *

> * * We are better satisfied with the reasoning of Judge SANBORN in his dissenting opinion, than with the views of the majority of the court."

The majority opinion in the case at bar cites *London and Lancashire Ins. Co. v. Fischer*, 34 C. C. A., 503, 92 Fed., 500 (C. C. A., sixth circuit), and *McElroy v. British American Assurance Co. of Toronto, Canada*, 36 C.C.A., 615, 94 Fed., 990; it is perhaps sufficient to say that a casual reading of the opinions in those two cases will show that the views of Judge CALDWELL as expounded in the *Norwood* case, are accepted without consideration of the legal impossibility of waiving a condition of a subsequently executed contract, nor of the abrogation, necessarily involved, of the rule enforced by all courts, with exceptions generally only against insurance companies, which is so clearly and succinctly stated by Judge SANBORN in the quotation last above made from his dissenting opinion in the case at bar.

In the *McElroy* case, the learned circuit court of appeals of the ninth circuit, do not pretend to separate and distinguish the principles underlying the several classes of cases which it cites in support of its opinion and judgment. A number of decisions on the question of waiver are referred to, including certain cases reported in 149 N. Y., which are cited in the majority opinion in the case at bar, and the court fall into the same error as the state courts, holding that there can be a waiver by the agent's knowledge of concurrent insurance and an existing incumbrance before the policy is written, of a condition of the policy against concurrent insurance and existing incumbrances not consented to in a particular manner, and which policy, when delivered to and accepted by the insured, contains the identical condition held to be waived; referring to a line of decisions which, like the *Wilkinson* case, rests upon the principle that *the act of the agent of an insurance company in taking a written and signed application for insurance*, and

who, with knowledge of the facts, inserts statements therein at variance with the facts as they exist, is the act of the company itself.

There is nothing in the facts of the *McElroy* case as recited by the court, to justify the application of the principle involved in the *Wilkinson* and kindred decisions. The *McElroy* case was decided, and wrongly decided on the question of waiver, and the false logic and disregard of elementary principles responsible for all such judicial utterances will, it is believed, be manifest to your Honors.

Statements to the effect that decisions of this character are in accord with "the great weight of authority" are frequently found in judicial opinions which thus hack the insurance contract out of all semblance to its original form; this is a convenient, though trite phrase; but a carload of feathers, which a puff of wind would scatter to the four corners of the earth, does not weigh as much as a small bar of gold which can easily be hidden under the feathers; and the logic of the crisp and vigorous language of the court of appeals of the seventh circuit, in *United Firemen's Insurance Co. vs. Thomas*, 82 Fed., 406, and of Judge SANBORN's dissenting opinion in the case at bar, have cleared away a lot of rubbish which has crept into the reports regarding waiver of stipulations in insurance policies: their views are in harmony with all that this court have ever said, and they ground their opinions upon the decisions of this supreme tribunal of the world, which have either been negligently overlooked or intentionally disregarded by every court and every judge who has held to the contrary of the *Carpenter* case.

In *Union National Bank v. German Insurance Company*, (C. C. A., 7th circuit), 71 Fed., 473, the facts were exactly like those in the case at bar. For a full statement thereof, your Honors are referred to the opinion. Judge JENKINS for the court, says:

"The limitation of the amount of concurrent insurance was therefore material to the risk; and, since the amount of concurrent insurance was in excess of the limitation there can be no recovery if that provision has not been waived. *Carpenter v. Insurance Co.*, 16 Pet., 495," and other cases.

The court further say:

"It is insisted that this provision of the contract has been waived because of the fact that O'Rourke, *the agent, knew, when this policy was issued, of the other insurance upon the property in excess of the stipulated amount.* It is not urged that the defendant company knew of the fact but that the knowledge of the agent is to be imputed to the defendant. It is said that, in the autumn prior to the issuance of this policy, the agent stated to Mr. Morrison that the taking of the policy in the Phoenix of $2,500 upon the wheat in the granary would not conflict with his carrying $2,500 other insurance on the farm products contained in the granary. There are several reasons why this contention cannot avail:

1. *This conversation was prior to the issuance of this policy.* We need not now consider whether the issuance of the policy in question was a part of and a mere continuation of the original transaction in November, 1888, or was an independent and a different transaction. In either case the conclusion must be the same. *We think it established and elementary law that parol negotiations leading up to a written contract are merged in the contract, and are not to be controlled or affected by parol evidence of the understanding of the parties.*

The same court in *United Firemen's Insurance Co. v. Thomas, supra*, 82 Fed., 406, and 92 Fed., 127, held squarely to its previous decisions. The court say:

"The question is presented whether his knowledge, (that of the agent of the insurance company) prior to the issuance of the policy, of intended other insurance, will vitiate a stipulation in the policy forbidding such other insurance. It is the settled law with respect to written contracts of insurance, as well as to other written contracts, that all negotiations or agreements leading up to the written contract are merged in it, and that parol

evidence of a supposed prior agreement cannot be entertained to contradict the express stipulations of the written contract. Thus, in *Thompson v. Insurance Co.*, 104 U. S., 252, 259, it was ruled that 'a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing.' We have had occasion to speak to the same effect, and in no doubtful language. *Union Stock Yards & Transit Co. v. Western Land & Cattle Co.*, 18 U. S., App., 438, 453, 7 C. C. A., 660, and 59 Fed., 49; *Gorrell v. Insurance Co.*, 24 U. S., App., 188, 11 C. C. A., 240, and 63 Fed., 371; *Lumber Co. v. Comstock*, 34 U. S. App., 414, 18 C. C. A., 207, and 71 Fed., 477. *The written contract speaks conclusively the agreement of the parties, and cannot be contradicted by parol. Therefore a supposed agreement to permit other insurance, made before the written contract, cannot avail to defeat the subsequent express stipulations of the written instrument. Much less can mere knowledge of an intention of the proposed assured to effect, or that he had effected, other insurance, avoid the conditions of the subsequent written contract.*"

A rehearing in the case having been granted, the court remark (92 Fed., 127, 135), upon the point under consideration: "We are satisfied that the correct result was arrived at in our previous decision."

In *Hartford Fire Insurance Company v. Small*, 66 Fed., 490, the circuit court of appeals of the 5th circuit say of the identical clause which we insist bars the plaintiff's recovery herein:

"These stringent clauses in contracts of this kind are often made the subject of adverse comment, and, with whatever of justice this is often done, it must be borne in mind that courts do not make contracts for parties, and must enforce them, unless there is some valid reason for not doing so. On this subject the supreme court of the United States, in the case of *Insurance Co. v. Unsell*,

144 U. S., 450, 12 Sup. Ct., 671, quoting from the case of *Thompson v. Insurance Co.*, 104 U. S., 252, says:

'Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default.'

It is perhaps proper to say in this connection that the question of consent to additional concurrent insurance is not a mere technical one, but is based upon sound principles in the law of insurance. It is to discourage overinsurance where it would be to the interest of the assured to incur a loss, and so put a premium on fraud."

The following language of Mr. Justice MILLER in *Insurance Co. v. Lyman*, 15 Wall., 664, is in point:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, *and is unembarrassed by any written contract for the same insurance*, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that *when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have.*"

That statement was not given in the *Norwood* case, the consideration due the supreme court of the United States, wherein the majority of the circuit court of appeals remark, if the insurance contract "can be made by parol it may be varied by parol," and that "parties to contracts cannot disable themselves from making any contracts allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol and a parol one changed in writing, despite any provision in the contract to the contrary."

Mr. Justice MILLER further observes in his opinion in the case last cited:

"We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, *neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement.*"

In *Allison v. Phoenix Ins. Co.*, 3 Dill 480, the *Carpenter* case was distinguished, Judge DILLON holding that it did not control the case before him, said:

"But, if the case at bar falls within this principle, *it is our duty* implicitly to apply that principle to it."

The supreme court of Missouri, in *Hutchinson v. Western Ins. Co.*, 21 Mo., 97, cited and followed in *Rothschild v. American Central Ins. Co.*, 62 Mo., 356, 362, announce a clear cut statement of the rule:

"If other insurance exists at the time, and is not endorsed, although communicated or known to the underwriters, it is not enough. The condition is not complied with, and no contract exists. (*Carpenter v. Providence-Washington Ins. Co.*, 16 Pet., 512; *Barrett et al v. Union Mutual Fire Ins. Co.*, 7 Cush., 178; 1 *Phillips on Ins.*, 477.)

There can be no distinction in this particular between a present and a subsequent insurance, and the present condition extends to both existing and future policies, and if there is a failure to indorse either, the stipulation is not complied with."

In *Gardiner v. Insurance Co.*, 38 Me., 439, 442, citing the *Carpenter* case, the court say:

"The plaintiff had the right to enter into such contract if he

deemed it proper, and though it may operate severely upon him, yet, it is not competent for the court to relieve him from the legitimate consequences of his own voluntary contract."

It is to be borne in mind that this is not a suit in equity to reform the contract, but an action at law in which the policy as made delivered and accepted, is declared upon as the basis of the suit.

No agreement is pleaded that consent for concurrent insurance was to be indorsed in writing upon the policy; not even an agreement that concurrent insurance was, in fact, to be allowed; but the plaintiff's right to recover is placed squarely upon the allegation (3), that the company's agent "issued said policy, * * * with knowledge before hand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, on the property covered thereby." And that by the conduct of its agent "the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy, notwithstanding said condition." Nor does the reply (15, 16), plead an agreement to indorse in writing upon the policy the company's consent to concurrent insurance, nor does it allege that the defendant's agent consented to concurrent insurance, but the allegations of the petition are substantially restated, and the issuance of the policy, with knowledge of concurrent insurance, is pleaded as a waiver and estoppel of the condition against concurrent insurance not consented to in writing indorsed on the policy sued upon.

But a plaintiff in a law action is bound by his pleading, and in a suit upon a contract upon which the petition declares, is bound by the provisions and conditions of the contract.

In *Imperial Fire Ins. Co. of London v. Coos County*, 151 U. S., 452, 14 Sup. Ct., 379, it is held that a condition avoiding the policy in case "mechanics are employed in building, altering, or repairing the premises without notice to or permission of the insurer" is broken, and the policy annulled, by the making of extensive alterations without such notice or permission, irrespective of whether the risk was in fact increased during the time of the alterations, or whether the increase continued at the time of the loss.

This court say:

"The specific thing described in the last condition as voiding the policy, if done without consent, was one which the insurer had a right, in its own judgment, to make a material element of the contract, and, being assented to by the assured, it did not rest in the opinion of other parties, court or jury, to say that it was immaterial, unless it actually increased the risk."

And your Honors quote with approval the following language from *Mack v. Ins. Co.*, 106 N. Y., 560, 13 N. E., 343:

"These conditions when plainly expressed in a policy are binding upon the parties, and should be enforced by courts, if the evidence brings the case clearly within their meaning and intent. *It tends to bring the law itself into disrepute when by astute and subtle distinctions a plain case is attempted to be taken without the operation of a clear, reasonable, and material obligation of the contract.*"

Elsewhere in the opinion, your Honors say:

"It is enough that the parties have made certain terms and conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."

The language last quoted is cited with approval and followed by the circuit court of appeals of the sixth circuit in *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed., 358, in which

case a recovery upon the policy was denied, although its facts are closely analagous to those of *Insurance Co. v. Norwood* and *Ins. Co. v. Fischer, supra.*, the *Fischer* case, as will be remembered, having been decided by the same court.

And the same court in *Union Central Life Ins. Co. v. Berlin*, 101 Fed., 673, citing *Insurance Co. v. Coos County* and *Insurance Co. v. Roseafield*, say:

"The parties, having made certain terms conditions on which the contract was to continue or to terminate, the contract as thus made must be enforced, *unless performance* was waived by the insurer."

The rule is thus stated by the supreme judicial court of Massachusetts:

"If from mistake or fraud an agreement is so defective, that instead of conveying the meaning of the parties, it expresses a different or opposite intent, if relief can be given at all it must be sought exclusively in a court of equity. A court of law must act under the agreement as it is; it cannot strike out or change any part or add anything to it, so as to contradict or vary the agreement contained in the written instrument."

Barrett v. Ins. Co., 7 Cush., 175; citing *Carpenter v. Ins. Co., supra.*

The facts in the case in Cushing were that, when the policy issued "there was a previous insurance which was not expressed, nor in any way mentioned or referred to in the policy;" and the court say:

"By its own express terms, therefore, this policy is void."

In *Batchelder v. Queen Ins. Co.*, 135 Mass., 449, the rule laid down in Cushing predicated upon the *Carpenter* case was adhered to. Mr. Justice HOLMES speaking for the court said:

"The policy sued upon was conditioned to be void in case of other insurance, and the plaintiff's evidence showed that there was other insurance outstanding when the

policy was delivered. But there was also evidence tending to show that the breach of condition was known to the defendant at the same time; and the plaintiff argues that he was at least entitled to ask the jury to find that the breach had been waived. However the law may be elsewhere, it is settled the other way in Massachusetts. A breach of a contract happening after a policy is issued, may be waived, no doubt; but when the breach exists at the moment when, if ever, the contract comes into existence, it must be waived at that moment, if ever, and at that very instant the writing purports to establish and insist upon the condition. We must follow the decisions that parol evidence of such a waiver as is relied on in this case would contradict the written instrument upon which the suit is brought. *Barrett v. Union Ins. Co.*, 7 Cush. 175."

The court also cite *Oakes v. Ins. Co.*, 135 Mass., 248, in which *Barrett v. Ins. Co., supra*, is thus commented upon:

"In that case, a policy was issued by a mutual company subject to a by-law, which formed part of the contract, to the effect that all policies upon the property previously insured should be void, unless such previous insurance was mentioned in the policy at the time it was issued. There was previous insurance not mentioned in the policy; and it was rightly held that, in an action on the policy, parol evidence was inadmissible to show that this had been made known to the company and assented to by it. The evidence would have utterly contradicted the written instrument declared on. The policy in effect stipulated that its delivery should not make a contract, if there was previous insurance not mentioned. The evidence went to show that delivering the policy made a contract, notwithstanding such insurance; or, in other words, that *the condition precedent was not insisted on* at the very moment when, *by the words of the policy, it was insisted on.*"

The Authority of the Agent Who Issued the Policy in Suit was Limited and the Insured was Notified of the

Restrictions Upon the Agent's Authority, and the Measure of His Power, and the Manner in which only it Could Be Exercised, By the Policy.

The duties and powers of Borgelt, the recording agent of the defendant, are found by the jury (18), as follows:

"A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent."

This finding accords with the averment of the petition respecting the character of Borgelt's agency. It thus is limited and prescribed, and cannot be considered as in any sense a general agency. From the expressions to be found in many of the decisions, it apparently has been assumed that such an agency as that of the individual who wrote the policy in suit in the case at bar is a general agency, and upon this erroneous assumption many erroneous judgments have been rendered. Some of these decisions are noticed by the supreme court of Rhode Island, in *Reed v. Insurance Co., supra.*

The *Norwood* case assumes that the agent who wrote the insurance was a general agent; but, as well might a ticket seller at a railroad depot be held a general agent of a railroad company. The insurance business has reached such proportions in this country that the court will take judicial notice that insurance companies do not clothe every person authorized to solicit insurance, with the powers of general agents.

State agents who establish and inspect local agencies, adjust losses, and even define the business policy which an insurance company shall pursue in a state or locality are generally not clothed with the powers of general agents.

The doctrines of the law of agency ought not to be so distorted as to do violence to language and the usage of the commercial world.

The policy in suit originated in New York, and is generally known in the insurance business and recognized by decisions of courts of last resort from Maine to California as the New York standard policy. By the statement of facts in *Quinlan v. Insurance Co.*, 133 N. Y., 356, 31 N. E., 31, a case frequently cited and followed by the circuit court of appeals for the eighth circuit, and especially in *New York Life Ins. Co. v. McMaster*, 87 Fed., 63, and in *McMaster v. Ins. Co.*, 99 Fed., 885, *supra*, it appears that the New New York standard policy was formulated by an act of the legislature of New York passed in 1886; and the opinion in the *Quinlan* case states the construction of the court of appeals of New York upon the clause of the policy under consideration. That court in a still later case, viz: *Moore v. Hanover Fire Ins. Co.*, 141 N. Y., 219, 36 N. E., 191, in an opinion concurred in by Mr. Justice PECKHAM, make use of the following language:

"The use of the standard policy was compelled by legislative enactment to remedy existing evils, and among others to protect insurance companies from *the perils of alleged parol waivers by their local agents.*"

The language quoted is of great significance and makes it plain that the radical decisions of radical courts have utterly misconceived the purpose of the adoption of a standard form of fire insurance policy.

In the *Quinlan* case it is said:

"No principle is better settled in the law, nor is there any founded upon more obvious justice, than that if a person dealing with an agent knows that he is acting under a circumscribed and limited authority, and that his act is outside of and transcends the authority conferred, the principal is not bound, and *it is immaterial whether*

the agent is a general or special one, because a principal may limit the authority of the one as well as that of the other. *Walsh v. Insurance Co.*, 73 N. Y., 10. The limitations upon the authority of Kelsey were written on the face of the policy. It declared that 'no officer, agent, or representative' of the company should have power to waive any provision or condition embraced in the printed and authorized policy, but power is given to agents to waive added provisions or conditions, provided such waiver is written upon or attached to the policy. *Where a policy permits an agent to exercise a specified authority, but prescribes that the company shall not be bound unless the execution of the power shall be evidenced by a written indorsement on the policy, the condition is of the essence of the authority*, and the consent or act of the agent not so indorsed is void."

The court, speaking of the change in the condition of the insurance business because of the adoption of the standard form of policy, say:

"Now, as heretofore, it is competent for the parties to a contract of insurance, by agreement in writing or by parol, to modify the contract after the policy has been issued, or to waive conditions or forfeitures. The power of agents, as expressed in the policy, may be enlarged by usage of the company, its course of business, or by its consent, express or implied. * * * But where the restrictions upon an agent's authority appear in the policy, and there is no evidence tending to show that his powers have been enlarged, there seems to be no good reason why the authority expressed should not be regarded as the measure of his power."

This case also holds:

"It is immaterial whether the plaintiff read the policy or not, or that he had no actual knowledge of the conditions or of the limitations of the power of Kelsey (the agent). *The conditions and limitations were a part of the contract, and he was bound to take notice of them*, and is not excused upon the plea that he omitted to acquaint himself with the provisions of the policy."

In *Kyte v. Commercial Union Assurance Company*, 144 Mass., 43, 10 N. E., 518, Mr. Justice DEVENS, speaking for the court, said:

"*An agent to receive premiums and issue policies is not* independently of any evidence showing that he has a much larger authority than this, *empowered to waive conditions so important that parties have seen fit to incorporate them into their contract.* Some additional evidence must be offered, as that he had been held out by the company as possessing such authority, or that the company had so ratified similar acts, or so conducted itself, in regard to other transactions, that the insured was justified in believing that he had."

In *Ruthven v. American Fire Insurance Company*, 92 Ia., 316, 60 N. W., 662, it is stated:

"Ingersoll, Howell & Co., were, as we have already stated, local agents of the defendant company. They had nothing to do with the adjustment of losses. *The mere fact that an agent is shown to have authority to issue policies and countersign the same does not warrant an inference that he has authority to* adjust and settle losses, or *waive the performance of the conditions in the policy*; and the fact that he assumes to do so does not even tend to establish his authority."

The New York court of appeals, in *Moore v. Ins. Co.*, *supra*, say of that clause of the standard policy under consideration, that:

"*Every person* who now enters into a contract of insurance *is required to agree* that no officer or agent or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms thereof may be subject of agreement endorsed thereon; and as to such provisions and conditions the waiver must be written upon or attached to, the policy; *and he specially covenants that he will not claim any privilege or permission unless it be in writing.*"

In *Smith v. Niagara Fire Insurance Company*, 60 Vt., 682, 15 Atl., 353, it being undisputed that one Turner was the com-

pany's general agent, and with authority, unless restricted, and with notice to the insured of the limitation of his power, to waive any condition of the policy, the court observed that "the question remains whether he could do so save, in the manner provided by the contract." The opinion, which is an exhaustive review of the cases on the point, recites:

"One condition of the policy is that *no officer, agent, or representative* of the company should be held to have waived any of the conditions of the policy, unless such waiver was indorsed on the policy. *This provision was a valid one, binding upon the parties, and effect should be given to it.* While the defendant could give its oral consent to a waiver of the statement, no officer, agent or representative could consent unless the consent was indorsed on the policy. This point we think well taken. In *Carrigan v. Insurance Co.*, 53 Vt., 418, the contract provided that no agent was empowered to waive any of its conditions without special authority, etc., and it was held that this term referred to special agents, not general ones, and the case notes the distinction between the two; *here the limitation is upon the authority of any officer, agent, or representative.* If Turner was not an officer, he was certainly a representative; and his want of authority to waive any condition, unless by writing, indorsed on the policy, was brought to the knowledge of the plaintiff by the contract itself; and, where an agent's acts are in excess of such authority the principal is not bound. *Insurance Co. v. Wilkinson, supra* (13 Wall., 222); *Packard v. Insurance Co.*, (Me.) 15 Ins. Law. J., 475. Where an agent has apparent authority to do an act, his principal is bound; and, if the latter claims that the act is in excess of the agent's real authority, he should show actual notice to the party with whom he deals. In the case at bar the law presumes notice. It is a part of the contract. The plaintiffs agreed to it. Why should they be released from it? In *Walsh v. Insurance Co.*, 73 N. Y., 5, the court were called upon to meet a question similar to the one involved here, and they said: 'The company could itself dispense with this condition by

oral consent as well as by writing; and Carpenter (the agent) unless specially restricted, would have possessed, in this respect, the power of the principal. But the policy contains the provision that no agent of the company shall be deemed to have waived any of the terms and conditions of the policy, unless such waiver is indorsed on the policy in writing. This is a plain limitation upon the power of agents, and can mean nothing less than that agents shall not have the power to waive conditions except in one mode, viz., by an indorsement on the policy. The plaintiff is presumed to have known what the contract contained, and the proof tends to the conclusion that this provision was brought to his notice. He saw fit, however, to accept the assurance of the agent that an entry in the register was sufficient. It is difficult to see how, upon the law of contracts and agency, the plaintiff can recover. The entry in the register was not an indorsement on the policy. The oral consent was an act in excess of the known authority of the agent. *The provision was designed to protect the company against* collusion and fraud, and *the dangers and uncertainty of oral testimony*. The case seems to be a hard one for the plaintiffs, but courts cannot make contracts for parties, nor can they dispense with their provisions.' The same court, in *Marvin v. Insurance Co.*, 85 N. Y., 278, in disposing of an analogous question said: 'Here the policy in plain terms denied to any agent, local or general, the power to waive conditions; reserved that authority solely to the head office and some officer of the company there; and gave notice to the assured, upon the face of his policy of the existence of this restriction. Henkle, therefore, had no power to waive payment.' The same rule has been followed in Massachusetts. *Forbes v. Insurance Co.*, 9 Cush., 470. In *Bank v. Insurance Co.*, 11 Cush., 265, under a like limitation, an agent took the policy, made a memorandum on a book, and told the assured that it was the same as if indorsed on the policy. The court held that the policy was void. In *Hale v. Insurance Co.*, 6 Gray, 169, the policy prohibited previous

insurance without the consent of the president in writing. It was held that the policy was invalid, although the jury found an oral consent by the president."

The supreme court of Vermont in the case cited, referred to *Kyte v. Assurance Co., supra*, and *Cleaver v. Insurance Co.*, 65 Mich., 527, 32 N. W., 660, the latter case being reported a second time in 71 Mich., 414, 39 N. W., 571, and quoted the following language of Judge DEVENS in the *Kyte* case:

"*Nor even if the agent had the fullest authority, could the conditions of the policy be waived other than in the manner in which they provide for such waiver. The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertain ties of oral evidence, and by this the insured has assented to be bound.*"

In the first appeal in *Cleaver v. Traders' Insurance Co.*, 65 Mich., 527, it was held:

"It cannot be successfully maintained but that the company has the right and power to restrict, as it may choose, the powers and duties of its agents, and, when the authority is expressly limited and restricted by the policy which the insured receives, *there can be no good reason, either in law or equity, why such limitations and restrictions shall be considered as known to the insured, and binding upon him.* This is not a case where the insured had a right to rely upon the action of the agent, or to presume that his action was known to the company, and ratified by them, as in *Security Ins. Co. v. Fay*, 22 Mich., 467. The policy received by Cleaver distinctly pointed out the way to procure additional insurance without voiding the first insurance, and expressly prohibited the agent from waiving or altering or modifying the process of obtaining further insurance.

The fact that plaintiff may not have read the printed conditions of his policy, and relied in ignorance of them upon the implied or assumed powers of the agent, can

not help him. It was his business to know what his contract of insurance was, and there can be no difference in this respect between an insurance policy and any other contract. In the absence of any fraud in the making of the same, and none is claimed in this case, the insured must be held to a knowledge of the conditions of his policy, as he would be in the case of any other contract or agreement. When the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the insured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy."

On the second appeal of the same case, 71 Mich., 414, it was said:

"The fact that Quinn (the company's agent) had authority, in a certain way and manner, to consent to the taking of the additional insurance, and had done so in other cases, does not aid the plaintiff. *He did not consent in this case within the line of his authority or in the manner prescribed by the policy*; and it is not shown that he was authorized to waive any of its provisions. The case, therefore, in this respect, stands as it did before, controlled by the clauses in the policy providing that the policy should be void if the insured procured further insurance without the indorsement of the consent of the company upon the policy, and that the agent has no authority to waive or modify this condition."

This is the rule in California, notwithstanding *Farnum v. Ins. Co.*, 83 Cal., 246, 23 Pac., 869, which is an authority in that state only for its own facts, and which contains a discussion of the effect upon the policy of credit given by the local agent for the premium thereon.

In *Gladding v. Insurance Co.*, 66 Cal., 6, 4 Pac., 764, it was claimed that the agent of the insurance company consented to an increase of the risk, but the court held:

"As to who should have indorsed on the policy a consent to an increase of risk in order to have it constitute a waiver of the condition that if the risk was increased the policy should be void, the instrument is silent. But it explicitly declares that unless so indorsed it shall not be construed as a waiver of any written or printed condition or restriction contained in the policy. *Apparently, the mode is the measure of the power.* If so, no officer of the company was authorized to consent to an increase of the risk in any other than the prescribed mode. We do not doubt the competency of the parties to stipulate that no condition or restriction contained in the policy should be waived except by endorsement on it; and that they did so stipulate is too clear to admit of doubt."

In the later case of *Enos v. Sun Insurnce Co.*, 67 Cal., 621, 8 Pac., 379, the following ruling was made, as shown by the head-notes of the case in the Pacific Reporter:

"Where the contract of an insurance company exempts it from the effect of any statement or act not contained in the written application for the policy, or indorsed on the policy, it is not bound by notice to its agents of anything different from what the policy and application contained.

Where a policy provides that a waiver of conditions contained in it can only be by indorsement or agreement on or attached to the policy, the local agent of the insurance company cannot waive the conditions of the policy except in the manner provided."

In *Ruthven v. American Fire Ins. Co.. supra*, it was held that not only the local agents but the special and adjusting agents of the company, had no power to waive a provision of the policy in any other manner than that prescribed by the policy itself. The court say:

"The authority of Miller (the special agent and adjuster), as well as Ingersoll, Howell & Co. and Werniemont (the representative of another company who figured some what in the adjustment), was limited by the express terms of the policy, of which plaintiffs will be presumed to have had notice. The policy provides, in substance, that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy, except such as by the terms of the policy may be the subject of agreement indorsed thereon or added thereto. There is some conflict in the authorities as to whether this kind of an agreement or provision is valid or not. But we think the decided weight is in favor of the proposition that it is. (Citing authorities.)

What we do hold is that the provisions we have quoted are a limitation upon the power of its local, special, and adjusting agents, of which the plaintiffs had or are presumed to have had, knowledge, and that any agreement or waiver which they attempted to make would not be binding upon the company because not authorized."

In *Northwestern National Ins. Co. v. Mize*, 34 S. W., 670, the court of civil appeals of Texas reversed a judgment against the insurance company upon the following facts: The policy contained what is known as the iron-safe clause, compliance with which, it was claimed, was waived by the agent of the company at the time the policy was delivered. The insurance company had no notice of the attempted waiver on the part of its agent. The court say:

"The testimony shows, without contradiction, that appellee did not have an iron safe, and made no pretense to comply with the conditions expressed in the clause in question. To avoid the effects of the agreement, it was alleged and proved that, at the time the policy was tendered to appellee, the agent of the appellant told him that it was not necessary to comply with the requirements in the clause. Appellee read and fully understood the clause in question, and with this knowl-

edge accepted it. * * * The testimony shows that the local agent who issued the policy did not report to the general agents of the company anything in regard to the waiver of the iron-safe clause, and the insurance company had no notice whatever of any such agreement, unless notice to the local agent was notice to the company.

It is provided in the policy that it 'is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed or added thereto; and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative, shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.' As said in *Insurance Co. v. Wagner*, (Tex. Civ. App.), 30 S. W., 959, 'the object of this clause is to define and limit the powers and authority of the agent, and to prescribe the subjects about which he shall and shall not have authority to waive the provisions of the policy.' In this clause it is said, in distinct, plain language, that the agent shall not have the authority to waive the iron safe clause. The insured was charged with notice of the limitation upon the powers of the agent. *Insurance Co. v. Kempner*, 87 Tex., 229, 27 S. W., 126. The agent in endeavoring to set aside the iron safe clause, was acting contrary to his authority, and his knowledge of the facts was not notice to or binding upon the insurance company. *Insurance Co. v. Waters*, (Tex. Civ. App.), 30 S. W., 576; *First Nat. Bank v. Lancashire Ins. Co.*, 62 Tex., 466. Discussing the clause in question, the supreme court of Oregon says: 'No rule is better settled than where a

limitation on the power of an agent is brought home to the person dealing with him, such person relies upon any act in excess of such limited authority at his peril; and hence, when an insurance company limits the power of its agent, and notice of such limitation is brought home to the person dealing with him, it is not bound by any act done by the agent in contravention of the notice.' *Egan v. Insurance Co.*, (Or.), 42 Pac., 611."

The citation in the majority opinion, of the *Robbins* and *Wood* cases from 149 N. Y., will be hereinafter considered.

However, attention is directed to the fact that those cases, which it is submitted, misapply waiver and estoppel, through oral testimony with respect to an agreement or understanding regarding a contract of insurance subsequently reduced to writing and delivered, do not pretend to, and do not, repudiate the *Quinlan* and *Moore* cases, which expressly hold that the powers of local and recording agents of insurance companies are defined by the standard policy, and that *the method* of their exercise as therein prescribed, is *the measure* of such powers.

In *Bourgeois vs. Ins. Co.*, 86 Wis., 606, 57 N. W., 347, the court quote with approval the decision of the court of appeals of New York in the *Quinlan* case. The facts were "that the defendant's local agent was informed at the time the application for the insurance in question was made, that the plaintiff would take out $2,000 additional insurance upon the house, and that he consented thereto. This consent was by parol, and was the only consent procured or relied upon by the plaintiff."

The court discuss the standard policy of Wisconsin, which contains the identical condition against concurrent insurance found in the New York standard policy, and observe:

"It provides, in clear and distinct terms, that other conditions may be printed or written upon or attached to the policy, but that they shall not be inconsistent with, nor

a waiver of any of the provisions or conditions of the standard policy. In thus providing that other conditions may be incorporated in the policy by writing or printing, other methods are plainly excluded under familiar legal principles. * * * The condition here broken was one of the conditions of the standard policy. It is claimed that it was waived, not in printing or writing, but by mere word of mouth. * * * To our minds, it is clear that, since the enactment of this law, at least the local agent cannot, either in writing or by parol, at the time the insurance is effected, change or waive that provision of the standard policy prohibiting future additional insurance."

In *Insurance Co. vs. Lumber Co.*, 10 Colo., App. 223, 51 Pac. 174, the court of appeals of Colorado cite with approval the *Quinlan* and other cases cited in this brief, and announce the principles by which the authority of an insurance agent is to be measured. The agent in that case, not only had all the authority which Borgelt possessed, being the local agent at Denver of the company he represented, but had also issued policies in various other localities within the limits of the state of Colorado distant from Denver, and had occasionally acted as an adjuster on small losses for his company; but it was held that he was not a general agent, and an instruction to the jury on the assumption that he was a general agent was held error.

In *New York Life Ins. Co. vs. Fletcher*, 117 U. S., 519, this court say:

"The Company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he wrote the application, and was cognizant of the limitations therein expressed.

In *Globe, etc. Ins. Co. vs. Wolff*, 95 U. S., 329, the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as

the subsequent acts of the company permitted it to be disregarded.

In *Ins. Co. vs. Norton*, 96 U. S., 240, (one of the cases which the majority opinion in the *Norwood* case says effectually dissipate the doctrine of *Carpenter vs. Ins. Co.*), the policy contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures; and this court held that the company could have insisted upon these terms had it so chosen."

There can be no Waiver Prior to or Concurrently With the Execution and Delivery of a Contract, of Conditions Thereof. A Waiver, if any, Must be Subsequent Thereto.

In *Globe Mutual Life Ins. Co. v. Wolff, supra*, this court say:

"The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as *a fraud upon the assured*, if they were afterwards allowed to disavow their conduct and enforce the conditions."

The theory of the majority opinion in the case at bar is thus stated (40, 41):

"The doctrine in question rests upon the ground that facts made known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies, and collect premiums, is the knowledge of his principal, and that a fraud would be perpetrated if the insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon with knowledge of facts which under its provisions render it void *ab initio*. To prevent the perpetration of such frauds

the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies which in the light of known facts rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision or that through accident or mistake it failed to modify the condition before the delivery of its policy, as it intended to do, so as to render it valid."

This theory of the majority is effectually refuted by the following language (46) in Judge SANBORN'S dissenting opinion, which is strictly in line with the statement of this court in *Ins. Co. v. Wolff, supra:*

"There seems to me to be no ground for a waiver by, or an estoppel of the insurance company in this case for several reasons, (1) because the company expressly limited the power of its solicitor to make waivers or work estoppels of the character here invoked to those made in writing by indorsement upon the policy and it brought notice of this limitation home to the insured by an express stipulation in the policy which the insured accepted, (2) because an *an indispensable element of an estoppel* is some act, statement or representation which tends to deceive the insured and thereby induces it to adopt a course of action or a state of inaction that it would not otherwise have taken, and *this case contains no such element.* The insured knew that there was other insurance. It knew that that it was not indorsed upon the policy. It knew that the solicitor had no power to deliver a valid policy without such an indorsement, and it knew that it agreed that without this indorsement its policy should be void, for all these things were written in the contract and the insured was charged with knowledge of its contents, (3) because there can be no waiver without an intention to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and de-

livered at the time, (4), because no estoppel or waiver based on acts or knowledge prior to or contemporaneous with the making of an express written agreement on the subject can prevail over the express terms of that contract which as conclusively merges and supersedes all prior and contemporaneous negotiations and understandings by estoppel and by waiver as by words. *Insurance Co. v. Mowry*, 96 U. S., 547, 548; *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 409."

In *Thompson v. Ins. Co.*, 104 U. S., 253, 259, the policy provided that it should be void on the nonpayment of the note taken for the premium; and this court held that a plea that a parol agreement was made, at the time of the giving and accepting of the note and policy, that the policy should not become void for the nonpayment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice BRADLEY, in delivering the opinion of the court, said:

"An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument, made contemporary therewith, is void, and cannot be set up to contradict the writing."

In *Ins. Co. v. Mowry*, 96 U. S., 544, 547, the policy provided that it should be void and wholly forfeited if the premiums were not punctually paid. The agent who procured the policy agreed with the insured that the company should give notice when the premiums fell due, but this agreement was not contained in the policy. The company failed to give the notice, and the insured failed to pay the premium. The agreement of the agent before the policy issued was claimed to be an estoppel of the company against insisting upon the forfeiture of the policy. Mr. Justice FIELD, in delivering the opinion of the court, said:

"*All previous verbal arrangements were merged in the written*

agreement. The understanding of the parties as to the amount of insurance, the conditions upon which it should be payable, and the premium to be paid, *was there expressed, for the very purpose of avoiding any controversy or question respecting them.* * * * * *An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made.* * * * *The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made*, to which the person complaining is to be a party. He has it in his power, in such cases, to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulation in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y., 280; *Bigelow Estop*, 437, 441; *White v. Walker*, 31 Ill., 422; *Faxton v. Faxon*, 28 Mich., 159."

Speaking of the doctrine of waiver sought to be applied in a similar case, Circuit Judge JENKINS in *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 406, said:

"Nor do we understand that the doctrine of waiver can have application here. A waiver is an intentional relinquishment of a known right, an election by one to dispense with something of value, or to forego some advantage he might have taken or insisted upon. *Warren v. Crane*, 50 Mich., 301, 15 N. W., 465. Mr. BISHOP thus defines the term:

'Waiver is where one in possession of any right, whether conferred by law or by contract, and with full knowledge of a material fact, does or forbears the doing of something inconsistent with the existence of the right or of his intention to rely upon it. Thereupon he is

said to have waived it, and he is precluded from claiming anything by reason of it afterwards.' *Bish. Cont.* sec. 792.

But manifestly there can be no waiver of a nonexisting right, of that which does not exist. Delivery of the policy containing the stipulations against other insurance under circumstances which indicate a previous or contemporaneous parol agreement that such other insurance would be permitted cannot avail, for within the decision in *Thompson v. Insurance Co., supra*, and the other cases cited, no prior or contemporaneous parol agreement can be set up to contradict the writing. *The waiver must be subsequent to the written contract, and, to be operative, must be made not only with knowledge of the fact of other insurance, and with intent to waive the provisions of the existing contract, but must be supported by a valuable consideration*, or become operative by way of estoppel. Here, subsequent to the supposed knowledge of an intent to effect other insurance, the parties stipulated by their contract that it should be void if other insurance *had been* or should be effected, and that no waiver of any condition of the contract should be valid unless written upon or attached to the policy. *An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term of the contract made and delivered subsequent to such knowledge.*"

In *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. St., 45, the policy required that before the property insured should be transferred or conveyed, or the policy assigned, the consent of the company indorsed thereon in writing should be obtained. It was held that a waiver of the condition could not be predicated upon mere notice of the transfer, and that it was not necessary for the company to give notice of its disapproval. The court cite, among other cases *Carpenter v. Ins. Co., supra*.

In *American Credit Indemnity Co. v. Carrollton Furniture Mfg., Co.* 95 Fed., 111, the circuit court of appeals of

the second circuit had under consideration the terms of an insurance policy requiring notice of loss to be given within a certain time. It was claimed that the failure to give the required notice was waived by the defendant company.

The court say:

"The alleged waiver is founded entirely upon the silence of the defendant in not replying to the letter of December 17th. Mere silence cannot support the waiver of a positive requirement in the policy, in the face of the stringent terms of the contract, which expressly declare that silence is not a waiver of any defect in the notice of loss, *and by the further provision that changes in the conditions of the policy must be in writing, signed by the president or secretary.*"

On argument of this case in both of the lower courts, an attempt was made by opposing counsel to distinguish between cases where the additional insurance or incumbrance was effected after the policy was issued, and those where the insurance or incumbrance existed with the knowledge of the agent at the time the policy was issued. There is a distinction between the two classes of cases, but that drawn by counsel and some courts, rests upon the admitted want of authority of the agent after the issuance of a policy to alter its provisions, *and* the illegal claim that the agent has authority *before there is any policy*, to abrogate its terms. The true distinction between these two classes of cases is this: there may be a waiver of a condition of a policy in existence, but there can be none when the policy is *not* in existence. But there is no distinction in principle between a pretended waiver, by a verbal promise made before the delivery of a policy, to allow future additional insurance, and knowledge of or even verbal consent, prior to the delivery of the policy, to concurrent insurance, when the policy by its terms, requires such consent for either future additional or concurrent insurance to be by written indorsement thereon. *Insurance Co. v. Thomas, supra.*

The cases of *Wood v. American Fire Ins., Co.*, 149 N. Y., 382, and *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 477, already noticed, illustrate the confusion of ideas which is responsible for a great many similar decisions of state courts who have sought to strip the insurance contract of its conditions, and substitute an artificial, court-made contract in its stead; but the presentation of opposing authorities and the argument of counsel based thereon has served no purpose, if the utter lack of logic and disregard of fundamentals in the *Robbins* and *Wood* and similar cases have not been demonstrated.

The majority opinion in the case at bar lays some stress (40), on the statements to be found in the text books of JOYCE, OSTRANDER, and MAY on Insurance: *Joyce on Insurance* is but a collection of cases, and the author nowhere pretends to express an opinion as to what the law is or ought to be. The contrariety of judicial opinion is held up to the profession, and almost any kind of a case can be supported by some precedent cited by Mr. JOYCE.

Mr. MAY, in section 145a, cites *Insurance Co. v. Fletcher*, 117 U. S. 529, and quotes the following language from the opinion:

"It was the duty of the applicant to read the application he signed. He knew that upon it the policy would be issued if issued at all. It would introduce great uncertainty in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, could be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity."

Upon this the author comments as follows:

"This seems to be sense and law. No rule relieving one party to a contract of the duty to exercise ordinary

care and prudence is recognized in regard to any other sort of negotiations, and I see no reason why it should be applied merely to contracts of insurance."

Section 497 of Mr. MAY'S work which is the section cited in the majority opinion, states the rule laid down in the *Wilkinson* case which, it is contended, has no application to the facts of the case at bar and other cases like it, but rests upon the principle that the act of the agent, authorized to receive written and signed applications for insurance, who with knowledge of the actual facts, misstates them in the application, concealing such misstatements from the applicant, is the act of the company.

Section 243 of *Ostrander on the Law of Fire Insurance*, cited by Judge THAYER, purports only to be a statement of decisions of the state courts upon the point under consideration; but it is to be noted that the learned writer refrains from expressing any approval of the rule announced by the courts in the cases he cites. He says in the section cited:

"It has been held that where other insurance was existing at the time of the writing of the policy in suit, and was known to the agent of the company who wrote it, the insurer will be estopped from setting up such other insurance in a defense to a claim for loss, notwithstanding no notice and consent had been expressed in writing. This has been held with great uniformity in disregard of the stipulation in the policy that no agent of the company has authority to waive any of its conditions except by distinct and specific agreement endorsed thereon. The courts appear to have based their decisions upon the equitable principle that the insurer, having accepted the premium with full knowledge of the other insurance, ought not to be permitted to escape performance of the obligation it has assumed and for which it has received the consideration demanded."

This author recognizes the fact that these courts in giving free play to their notions of what an insurance pol-

icy ought to provide, have stricken out of the insurance contract the condition under consideration, and states the ground upon which it professedly has been done; but we are permitted to state to your Honors, upon the authority of Mr. OSTRANDER himself, that, according to his view of the law, these cases abandon time-honored principles of construction, and by refusing their application to the insurance contract, open a door to frauds of the worst character; that the tendency of many state courts to depart from the rule that the written contract must be held to express all prior and contemporaneous agreements, leads to danger and takes away important safeguards of justice; and that the true rule in this class of cases is that laid down in the *Carpenter* case.

II

The Findings of Fact Leave the Question of Waiver to be Inferred as a Matter of Law, and the Judgment for Plaintiff Cannot be Sustained.

Waiver is a question of fact necessarily involving intent. Intention cannot be inferred as a matter of law; it also is a fact.

The jury found as between a representative of the plaintiff corporation who testified that the petitioner's agent was informed of the fact of concurrent insurance, and the agent who denied that he had been thus informed, that the agent did know of the concurrent insurance at the time he delivered the policy in suit; but that is as far as the finding goes. It does not reach the evidentiary fact of intention or the ultimate fact of waiver.

In *Patterson v. United States*, 2 Wheat., 221, 225, this court held:

"A verdict is bad if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue.

The reason of the rule is obvious: it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet, if it appears to that court, or to the Appellate Court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict."

See also *Suydam v. Williamson*, 20 How., 427.

The circuit court of appeals of the seventh circuit in *Wesson v. Saline County*, 73 Fed., 917, say:

"The question for review upon a special verdict or finding is whether the facts found are sufficient to support the judgment (Rev. St. sec. 700); and it is manifestly important, especially to the party having the burden of proof, that all the facts essential to the relief sought shall be explicitly and fully stated."

And the same court, in *Sneed v. Sabinal Mining & Milling Co.*, 73 Fed., 925, observe:

"Care should be taken to distinguish between the finding of a fact and a mere statement of evidence which tends to establish, or, it may be, establishes, the fact."

And again, in *Daube v. Coal & Iron Co.*, 77 Fed., 713, the same court say:

"The silence of the verdict in respect to a fact is equivalent to an express finding against the party who has the burden of proof * * * and, if facts essential to that conclusion have not been found, the necessary inference is that they did not exist."

See also *United States v. Harris*, 77 Fed., 821.

Judge CALDWELL, in his caustic dissenting opinion in *McMaster v. New York Life Ins. Co.*, 99 Fed., 856, 887, says:

"The rule is absolute and without an exception that the special findings of fact of the lower court must distinctly and specifically find every fact essential to support

its judgment. Nothing can be supplied by intendment."

Judge SANBORN in his dissenting opinion in the case at bar (46) says:

"There can be no waiver without an intent to waive and no intent to waive can be deduced or inferred from the mere fact of knowledge in the face of an express written stipulation to the contrary made and delivered at the time."

Judge JENKINS, in *United Firemen's Ins. Co. v. Thomas*, 82 Fed., 406, *supra*, thus states the principle:

"An intent to waive cannot be entertained from the mere fact of knowledge in the face of an express term in the contract made and delivered subsequent to such knowledge."

In *Insurance Company v. Lumber Company*, 10 Colo., App., 223, 51 Pac., 174, *supra*, the court of appeals of Colorado say:

"It is equally true that an intention (to waive an express condition of the policy) may not be presumed from the mere possession of knowledge (of facts amounting to a breach of that condition). There must be some evidence in the case tending to show an intention on the part of the agent to waive it."

In *Insurance Co. v. Hebard*, 95 Pa. St. 45, *supra*, it was held that a waiver of the condition of a policy requiring written consent to a transfer of the property could not be predicated upon mere notice of the transfer.

In *Hartford Ins. Co. v. Small*, 66 Fed., 490, 493, the circuit court of appeals of the fifth circuit held:

"On a question of a waiver of an express condition of a written contract or a consent that such condition need not be complied with after a breach of the condition has been made by the insured, there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time, and that it was consciously and purposely done by the minds of the parties coming together upon the definite proposition."

But the evidence, instead of showing that it was the intention of the defendant company to waive the provision of its policy against concurrent insurance without notice and consent thereto indorsed thereon, shows that as soon as the company learned there was other insurance upon the property it denied liability. The only evidence in the record touching the subject of waiver is a letter from the defendant's general agent to the insured, dated August 2, 1898, *which was introduced in evidence by the insured*, and conclusively refutes the idea that there was any waiver by the company.

The letter contains the following recital:

"We have your favor of *the 26th ult.*, enclosing us what purports to be proof of loss, making claim under our policy No. 310024 of Lincoln, Neb., agency, and issued to you for $2500, on household furniture, etc., while contained in the three-story brick and stone building on Lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st of June, 1898, and beg to say in reply *that your sworn statement therein advises us* that you had other insurance on this same property to the amount of $1500. *This additional insurance held by you was without the knowledge or consent of this company*, and was not permitted by agreement as provided for in lines Nos. 11, 12 and 13 of the printed conditions of our policy, to which we beg to refer you.

We therefore regret to have to advise you, and do now hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310024 held by you, holding that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance above referred to."

No question was made in the circuit court of appeals, nor is any made here, that the evidence does not support the findings. It is understood that under the federal appellate practice questions of fact will not be inquired into;

but the findings do not pretend to pass upon the question of waiver, and the single item of evidence upon the question is brought to the attention of your Honors to demonstrate that the essential fact of waiver was a legal inference of the trial court and of the circuit court of appeals, from the fact of knowledge, *contrary to the only evidence* in the case upon the point.

CONCLUSION.

The *Carpenter* case, though decided more than half a century ago, is the latest utterance of this court dealing with the question of insurance law for the present consideration of your Honors; because it was the unanimous judgment of this court: because the opinion was written by one of the greatest jurists of this or any other country: because it enforced a voluntary contract entered into between the parties: because the court refused to permit the terms of that contract to be varied by oral testimony, it takes rightful precedence over the contrary opinions of subordinate federal courts and of all the courts of all the states, and your petitioner invokes the law of that case as a bar to recovery in this suit.

Very respectfully submitted,

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Petitioner.

OMAHA, October 1, 1900.

Office Supreme Court U.S.
FILED
APR 22 1901
JAMES H. McKENNEY,
Clerk.

No. 276.

Brf. of Greene & Breckenridge

For Petitioner Crapley

In the Supreme Court of the United States.

Filed April 22, 1901.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF AND ARGUMENT OF PETITIONER.

In the Supreme Court of the United States.

October Term, 1900.

No. 276.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Supplemental and Reply Brief and Argument of Petitioner.

By way of comment upon the brief of defendant the following considerations additional to those stated in petitioner's original brief are submitted.

Petitioner affirms and argues that the authority of an agent like him who wrote the policy in suit, is defined, prescribed and limited by the policy itself. And although by the terms of the policy, the agent had power to waive or alter the written instrument in certain particulars, the policy requires that waiver or alteration to be made in a specified manner. The decisions of the courts of last resort of the states of New

York, Massachusetts, Iowa, California, Vermont, Michigan, Texas, Wisconsin and Colorado, and of this court, are cited to the point that the method by which an agent of an insurance company may change or alter the written or printed contract of insurance, is the measure of his power in that regard. (Petitioner's original brief pp. 25 to 39.)

In the presentation of his theory of the law of this case, the writer of defendant's brief, by inadvertence or otherwise—and whether inadvertently or otherwise is left for the inference of your Honors—discusses the authorities above referred to as though they were cited upon the questions of waiver and estoppel which many courts have injected into this class of cases. But the question of the extent of an insurance agent's authority as defined by the policy he issues is one thing, and whether the Company has waived or is estopped to set up a particular provision of the policy is another thing.

It is admitted that there are courts holding that the authority of an agent of an insurance company is prescribed by the terms of the insurance contract, and cannot be exercised otherwise than in the manner pointed out by the policy, which have also held that *knowledge of an agent*, at the time the policy is issued, of facts which by its terms avoid it, is to be imputed to the company. This class of decisions exhibits to your Honors exactly that condition of judicial instability, want of logic and separation from principle, which petitioner desires to bring to the attention of this court. For, between the decisions of any court holding that the authority of an insurance agent is defined by the policy, and that the policy gives notice to the insured of the limitations upon the agent's power and

authority, and decisions of the same court rendered the next week or the next month or the next year, that the knowledge of the agent whose authority is thus limited, of facts which breach any of the conditions of the policy, is imputable to the company, there is an irreconcilable inconsistency; in the one case the contract is enforced, in the other it is disregarded; in in the one case, the relations of the parties and their rights under the contract are ascertained by reference to it; in the other, firmly imbedded principles with regard to the sacredness of written instruments and their inviolability by oral testimony, are swept aside.

Laws may change with changing conditions but principles are eternal, and no considerations of convenience, nor sympathy, nor of mere individual opinion, whether of judges, counsel, or litigants, ought to divorce the facts of a case from the principles by which it must be determined.

All the way through defendant's brief runs the innuendo which ought to find no expression anywhere, and is inexcusable except before a jury, that an insurance company should not be permitted to accept the premium for a policy and not pay when a loss occurs; and in great variety of phrases, the want of good faith of the petitioner in this particular case is sought to be impressed upon this court. Counsel for petitioner repel the insinuation of bad faith, and submit to the court that the record shows that as soon as the Northern Assurance Company learned of the existence of the concurrent insurance, which was through a letter from defendant to petitioner nearly sixty days after the fire had occurred, it denied liability because of such concurrent insurance, instructed its agents to return the

premium paid for the policy (see letter dated August 2, 1898, p 23, produced and offered in evidence at the trial by the Grandview Building Association), and the jury found in the following words that the defendant tendered a return of the premium paid upon the policy in suit (19):

"Finding 10. Did the defendant tender a return of the premium paid upon the policy in suit? If so, when and what amount?

Answer. Yes; on August 4, 1898, in the sum of $33.75, being the amount of the premium paid for the policy, and the same was not accepted by the plaintiff."

There is no pretense that *the company* actually knew before the fire of the concurrent insurance.

Borgelt testified (25) that "at the time he wrote that policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit and the first time he knew of any other insurance was after the fire. * * * The witness dealt with Mr. Walsh and Mr. Walsh didn't say anything to him about any other insurance."

The record further says:

"On redirect examination the witness testified that he has no recollection of having known anything about the other insurance until after the fire."

There are courts which now and then have lent an ear to considerations like those suggested by counsel, and he has probably been thus encouraged to predicate his prayer for an affirmance by an appeal to those considerations which can have no force in this court.

A brief reference to a very few of the cases cited

in behalf of the defendant which are claimed to sustain the contention of its counsel is deemed proper.

In *Commercial Union Assur. Co. v. Norwood*, 57 Kan., 610, 47 Pac., 529, cited originally by petitioner and claimed by defendant to sustain its contention, it is stated:

"*The pleadings, evidence and instructions in this case squarely present the question whether a prior parol agreement, made with the general agent of an insurance company, concerning the amount of concurrent insurance to be carried on the property insured, controls and defeats the express terms of the policy.* It appears without dispute, that one of the conditions of the policy was that it should be void if the insured should procure any other insurance on the property without the consent of the insurer, and that consent was endorsed on the policy for $32,500 only, of concurrent insurance. The prior parol agreement with Ormandy, with reference to the total amount of insurance to be carried on the property, and the fact that the plaintiffs had neglected to read the policy before the fire, are alone relied on to avoid the condition above mentioned. *There is no more wholesome or well-settled rule of law than that parol evidence of prior or contemporaneous conversations, and oral agreements, is inadmissible to contradict or vary the terms of a written contract.*"

In *Kalmutz v. Insurance Company*, 186 Pa. St., 575, 40 Atl., 816, the facts were that the policy was issued in April, 1894, and the defendant company's secretary, testified that he had notice of the additional insurance on the first Wednesday of November following. The court say:

"Notwithstanding the notice to the company, the policy was neither recalled nor canceled, and premiums or assessments collected were not returned, nor was any effort made to return the premium note

given by plaintiff, binding him to pay the premiums at such times and in such manner as the company's directors might by law require."

Upon these facts the court held that the company was estopped to insist upon the provision of its policy avoiding it for other insurance not consented to by endorsement upon the policy. And it is in connection with these facts that the decision must be considered. The mere statement in an opinion, of an abstract proposition is of little value unless it has pertinency and relevancy to the facts in the case. And upon the facts in the case now cited, the court quote the following language of Mr. Justice SHARSWOOD from his opinion in *Elliott v. Insurance Co.*, 66 Pa. St.. 26.

"Undoubtedly, if the company, *after notice or knowledge*, of the over-insurance, *treated the contract as subsisting*, by making and collecting assessments under it from the insured, they could not afterwards set up its forfeiture. *It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests.*"

It is insisted that the rule in Wisconsin is as stated in *Bourgeois v. Insurance Co.*, 86 Wis., 606, 57 N. W., 347, cited in the original brief of petitioner, and in *Straker v. Phenix Insurance Company*, 101 Wis., 413, 77 N. W.,, 752. The case last cited was grounded upon the statute prescribing the terms of the Wisconsin standard policy, which provides:

"No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto."

And of this the court say:

"In *Bourgeois v. Insurance Co., supra*, it was held that

11844

there could be no such waiver by parol. True, the act there construed was subsequently declared unconstitutional, upon a question not here involved. But the construction put upon that act is applicable to similar language in the present act."

Petitioner frankly admits that a number of state courts have decided the question involved in this suit in disregard of the doctrines of the *Carpenter* case (16 Pet., 495), and in disregard of the rules of evidence which the same courts apply and enforce with regard to other contracts. Hence, it is not improper to ascribe, to those courts who have stripped from the insurance policy one after another of its provisions, the conception, that an insurance policy is a promissory note payable in case of fire.

Those courts have discriminated against insurance companies in the construction of their contracts, and have refused the application of rules of law, by which rights under other classes of contracts are universally protected, and petitioner has the right to, and does complain because thereof. But this court has ever stood a bulwark against all such assaults upon the sacredness of contract obligations, and your Honors, speaking through the late Mr. Justice FIELD, in *New York Life Ins. Co. v. Fletcher*, , 117 U. S., 519, say:

"Contracts could not be made or business fairly conducted, if such a rule (under which a party to a contract might be allowed to show that he did not know what it contained) should prevail; and there is no reason why it should be applied *merely* to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others."

And the learned Justice made the following further observation, which may be very pertinently offered as

a complete answer to counsel or courts who misconceive the doctrine of *Insurance Co. v. Wilkinson*, 13 Wall., 222, to apply in cases like that at bar; distinguishing *Insurance Company v. Wilkinson*, *supra*, and *Insurance Company v. Mahone*, 21 Wall., 152, he says:

> "In neither of these cases was *any limitation upon the power of the agent brought to the notice of the assured.* * * * The court held that the powers of the agent are *prima facie* coextensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where such agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, although nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing on the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

The difficulty with the question under consideration may be thus stated: Courts supporting the contention of adverse counsel in the case at bar, including the majority of the circuit court of appeals for the eighth circuit, misapply the doctrines of waiver and estoppel. The word "misapply" is used in lieu of a better one. The doctrines of waiver and estoppel have no application in this class of cases. *The question in them all, including the case at bar, is one of agency*: the right of companies to limit the powers of their agents: and

whether notice of the limitations upon those powers is given to the purchaser of an insurance policy, by its terms. And it is therefore submitted that the question for your Honors to determine, is whether the resident agent of the Northern Assurance Company at Lincoln, Nebraska, had any authority to issue such a policy as the Grand View Building Association, in effect, claims the policy in suit to be. For, if it were possible to conceive that the provision of the policy that it should be void in the event of other insurance not consented to by endorsement thereon, or added thereto, *could be waived, in advance of its execution and delivery, by an oral understanding with the agent, or through information conveyed to him*, of the fact of the other insurance, the insured was immediately notified upon the instant that the policy came to his hands, that the company had not authorized the agent to make any such contract. There was one way, *and one only*, by which the agent of the Northern Assurance Company, was authorized to make a contract with the Grand View Building Association, for insurance upon property which was already insured to the extent of $1500; and that one way was by endorsing consent to the other insurance upon the policy in suit. The reason for such requirement is stated in numerous cases already cited. (See petitioner's original brief pp. 25, 39 inc.)

"The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertain ties of oral evidence, and by this the insured has assented to be bound."

Kyte v. Assurance Company, 144 Mass., 43, 10 N. E. 518.

Here, then, is the attitude of this case: A suit at

law is brought upon a policy of insurance; the policy as received from the agent is produced and offered in evidence by the insured, which avers both in its petition, anticipating the defense of the company, and in its reply, in an attempt to avoid it, that the policy which it sued upon and produced in evidence, *is not in fact, the policy which it bought from the company*. The company interposes its defense of a breach of the identical provision which the insured insists should be read out of the policy.

Will your Honors say that this is a case which calls for a departure from principles promulgated from this bench for more than a century? Would it not be the orderly mode of procedure for the insured to go into a court of equity and there seek a reformation of its contract?

The argument of counsel that the Federal courts ought not to make any distinction between causes at law and equity because the legislature of Nebraska has undertaken to abolish that distinction, is utterly untenable. *In Gravenberg v. Laws*, 100 Fed., 1, 4, the doctrine is thus stated:

"In *Sims' Lessee v. Irvine*, 3 Dall., 464, Mr. Justice IREDELL said:

'It is of infinite moment, in my opinion, that principles of law and equity should not be confounded, otherwise inextricable confusion will arise. Neither will be properly understood, and, instead of both being administered with useful guards which the policy of each system has devised against abuse, a heterogeneous mass of principles not intended to assort with each other will be blended together, and the substance of justice will soon follow the forms calculated to secure it.'

Whatever may be thought of this observation, when

most of the states have blended by Code procedure equitable and legal remedies, the federal courts are required to observe in their procedure the distinction between legal and equitable rights and remedies. In *Bennett v. Butterworth*, 11 How. 674, Chief Justice TANEY, delivering the opinion of the court, said:

'The constitution of the United States, in creating and defining the judicial power of the general government, establishes this distinction between law and equity; and a party who claims a legal title must proceed at law, and may undoubtedly proceed according to the forms of practice in such cases in the state court. But if the claim is an equitable one, he must proceed according to rules which this court has prescribed regulating proceedings in equity in the courts of the United States.'

It is settled beyond all controversy that under the constitution and laws of the United States the distinction between common law and equity must be maintained in the federal courts, although both jurisdictions are vested in the same courts. *Fitts v. McGhee*, 172 U. S., 516, 531, 19 Sup. Ct. 269; *Hurt v. Hollingsworth*, 100 U. S. 100."

Our reinvestigation of the case, following the reading of defendant's brief, confirms the conviction that your Honors should hold strictly in accordance with underlying and fundamental principles, and call back subordinate courts which have departed therefrom; for there is danger in departures from and modifications of principles,—danger that the whole body of legal principles will be changed and subverted. The wisdom of courts during centuries of jurisprudence by which rules regulating the introduction of evidence have been formulated, has given stability to legal procedure which has commanded the respect and reverence of the people; but courts which have departed

from "the old paths, where is the good way" are likely to become in time as unreliable and as unsatisfactory as political conventions.

Respectfully submitted,

CHARLES J. GREENE,
RALPH W. BRECKENRIDGE,
Attorneys for Petitioner.

OMAHA, April 10th, 1901.

No. 270.
Grand View Bldg. Ass'n.
By Webster for Respondent.

Office Supreme Court U.S.
FILED
MAR 25 1901
JAMES H. MCKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed March 25, 1901.

No. 270.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DEFENDANT.

JOSEPH R. WEBSTER,
HALLECK F. ROSE,
For Defendant.

STATE JOURNAL CO., PRINTERS AND STATIONERS, LINCOLN, NEB.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

NORTHERN ASSURANCE COMPANY OF LONDON, ENGLAND, PETITIONER,

v.

GRAND VIEW BUILDING ASSOCIATION.

No. 276.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

JOSEPH R. WEBSTER and HALLECK F. ROSE, *for Defendant.*

BRIEF OF DEFENDANT.

I.

Statement of the Case.

The suit is at law to recover $2,500 on a policy of fire insurance, the proportionate value of the insured personal property, consisting of furnishings of a boys' military and boarding academy. The answer (11-13) raises no issue as to issuance of the policy, payment of premium, ownership, or destruction by fire of the insured property, or as to making of a proof of loss. The defense pleaded is breach of a

policy condition exempting the company from liability "if the insured has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The fact that there was a subsisting insurance of $1,500 on the same property was disclosed in the petition, and was not put in issue by the pleadings. It was, however, averred and proved that the $1,500 policy was previously written, and was subsisting when plaintiff in error issued the policy sued on. In avoidance of this policy condition it was alleged in the petition (1-3):

Plaintiff shortly prior to issuance of the aforesaid policy by defendant had procured a policy of insurance from the Fireman's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire, of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire.

The fact of said subsisting insurance in said company was by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of its said policy and prior to payment by plaintiff of said premium therefor and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and collect and receipt therefor and who in fact accepted said risk and issued said policy, and collected and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance and with the intent knowingly to waive the condition of said policy that "it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance" on the property covered thereby. And by the aforesaid

several acts and by procuring, receiving, accepting, and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof and is bound by its said policy notwithstanding said condition. Plaintiff had no insurance on said property except as before stated.

To the answer, pleading a breach of this policy condition as an affirmative defense, the assured replied (15–16) as follows:

The plaintiff for reply to the answer of defendant herein denies that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant to plaintiff and without the knowledge of defendant; and alleges that the amount of insurance carried on said property by plaintiff was not in any manner increased after issuing of defendant's policy, or during the term of insurance under defendant's policy. The policy referred to in said answer, of $1,500 in the Firemen's Fund Insurance Company, was, on the contrary, subsisting at and prior to the issuance by defendant to plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy, on the same property covered by defendant's policy, was personally well known to A. D. Borgelt, defendant's recording agent who wrote said policy and accepted said risk, and who then had full charge of defendant's agency at Lincoln, Nebraska, with authority to accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and issuance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of $1,500; and said Borgelt as

such agent, with full knowledge of said fact, accepted the risk, and wrote, executed, and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in the defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received the premium therefor. By all the aforesaid several acts the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by indorsement on the policy; and defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy.

The jury, under direction of the trial judge, rendered a special verdict responsive to all the facts pleaded. The value of the insured property was found to be in excess of the total amount of insurance written by both policies. There is therefore no room for contention as to the measure of damages. The special findings, in so far as they relate to the matters pleaded by the assured in avoidance of the policy stipulation forbidding other insurance, are as follows (18–19):

Finding 5. Was there at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of $1,500 in the Firemen's Fund Insurance Company?

Answer. Yes.

Finding 6. Was A. D. Borgelt the agent of defendant company to issue policies of insurance and how are his pow-

ers defined, and did he issue the policy in question as such agent?

Answer. A. D. Borgelt was recording agent of the Northern Assurance Company at Lincoln, Nebraska, with authority from defendant to countersign and issue its policies and accept fire insurance risks on its behalf, and collect and receive premiums therefor, and issued the policy sued on as such agent.

Finding 7. Did A. G. Borgelt know when the policy in the defendant company was issued and delivered to plaintiff that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the property covered thereby, issued prior to the date of the policy of the defendant company, and was such knowledge communicated to said Borgelt by or on behalf of the assured?

Answer. Yes.

The facts being found specially and there being no assignment directed against the sufficiency of the evidence, the court will not be required to examine into the sufficiency of the testimony. But petitioner having injected into his statement an assertion that finding 7 was upon conflicting testimony and that the company's agent, Borgelt, denied any knowledge until after the fire of the other insurance, it is thought proper to set forth the testimony upon that point.

The assured's president, H. J. WALSH, testified (22) that Borgelt, the agent, was a tenant of witness. "The defendant had a previous policy on the water works and power house of the plaintiff but Borgelt informed witness that the defendant objected to the risk and asked Borgelt to cancel the policy, and witness, wishing to favor Borgelt as he was a tenant of witness, told Borgelt that there was but $1,500.00 insurance on the furniture and it would carry $4,000.00. Witness understood from his bookkeeper that there was at that time about $4,800.00 worth of furniture in the building

and Borgelt thought he could write the $2,500.00 additional insurance on the furniture and said he would do so. Witness did not procure any further or additional insurance on the subject of insurance covered by the policy in suit after the date of its issuance. Whatever insurance there was on the property was specified at the time this policy was issued and there was no other or different insurance than that which witness has referred to as having been mentioned to Mr. Borgelt." Burt Richards, another insurance agent, with whom witness carried risks, was requested to look after the matter for witness. Witness accepted the policy from Borgelt, paid the premium therefor, and put it in his safe, without ever having looked at it, and supposed it was like his other policies and never knew of the omission to make the endorsement permitting concurrent insurance until two or three weeks after the fire.

BURT W. RICHARDS testified (24): "Mr. Walsh had asked witness to take a certain policy of the Northern Assurance Company, covering the power plant, to Mr. Borgelt and have Borgelt rewrite it upon the furniture of the plaintiff which owned and operated the Worthington Military Academy and for the reason that the Northern Assurance Company had declined to carry the power plant, and Mr. Walsh had made arrangements with witness to write the insurance on the power plant; witness took the policy in the defendant's company, covering the power plant, and went across to Mr. Walsh's office and laid it on his desk, and said to Mr. Borgelt, 'Mr. Walsh has decided to let you place this policy on the furniture in the Worthington Military Academy, and I will write the power plant myself, inasmuch as your company won't carry it; so you write this up on the furniture concurrent with our policy of $1,500 on the furniture now.' The $1,500 policy referred to was in the Firemen's Fund, and witness had been the solicitor that had obtained the order for that $1,500 policy."

On cross-examination of the agent BORGELT, called as a

witness for the Insurance Company (25), he testified: "We talked to Mr. Walsh about the policy in his office, having previously gone to Mr. Walsh's office to inform him of the cancellation of the other policy, and at that time he told Mr. Walsh that he would like to have him place other insurance with him, and that he would like to carry the risk covered by the policy in suit. Witness was at that time a tenant of Mr. Walsh's building, with an office on the same floor with Mr. Walsh. The policy in suit was written after the cancellation of the previous policy on the power house of the Grand View Building Association. The power house policy was not ordered by Mr. Walsh, but was ordered by Mr. Richards from the Farmers and Merchants Company, and the talk witness had with Mr. Richards was about the power house policy. During the conversation between witness and Walsh, Walsh told witness he could have the insurance on the furniture. The policy was in the same amount and the premium was the same that was charged upon the power house policy. Witness does not remember that Walsh said anything to him about having $1,500 on the furniture, and that it would carry more, but he might have mentioned it."

It can hardly be contended, in view of the admission made by the agent, Borgelt, on cross-examination, that the assured may have informed him of the existing insurance of $1,500, that the seventh finding by the jury was based upon conflicting testimony. It certainly is conclusively shown that the assured acted in the utmost good faith, and on its part performed every act that in ordinary business transactions of this character could have been required of it. The collection and retention of the insurance premium, under these circumstances, certainly renders it unconscionable and even odious on the part of the insurer to insist for the first time after the destruction of the property by fire that no contract of insurance ever existed.

The record presents for decision the single question whether the company may successfully urge a breach of the policy condition mentioned, as a defense to liability on its policy issued with knowledge beforehand of the existing insurance, and after the assured had made a report thereof to the company's recording agent, who subsequently issued the policy and collected full premium from the assured.

II.

ARGUMENT.

Where an insurance agent with authority to accept risks, receive premiums, and issue policies, exercises such authority with knowledge of the existence of concurrent insurance on the insured property, the company is estopped after loss to insist that the policy is void because consent to such concurrent insurance was not given in writing. Knowledge of the agent in such case will be imputed to the company and that which the insurer knew when engaging in the venture, it will be presumed to have assented to.

The vital point in the case was stated in the majority opinion of the circuit court of appeals by Judge THAYER, as follows: "The general question which arises in this case is whether an insurance company should be permitted to take advantage of a condition contained in one of its policies to avoid the payment of a loss that has been sustained thereunder when it appears that the fact rendering the policy void by the terms of the condition which is pleaded as a defense, was an existent fact known to the insurer at the time it issued its policy, and accepted the premium, which for

that reason rendered the policy void, if at all, from the moment it was delivered." (Printed Record, pp. 38-39.) The findings of the jury heretofore quoted sufficiently state the facts on the record to refer to the court the decision of this question of law. The courts of the country generally, including the constituted federal tribunals inferior to this court, have for many years and with great unanimity resolved this question in favor of the insured and against the insurer. The modern doctrine is a departure from the precedent established almost sixty years ago in the case of *Carpenter v. Providence-Washington Insurance Co.*, 16 Pet., 495-512. It is not surprising, in view of the authoritative force of the opinions of this court, and the very great eminence of the late Justice STORY, who delivered the opinion in *Carpenter's Case*, that even at this day, there remain some differences of opinion among the circuit judges, justifying this court in exercising its extraordinary powers by granting the writ of certiorari, in order that it may determine between the earlier and the more modern doctrine, and announce its conclusion in the interest of uniformity of decision for the guidance of the circuit judges.

This case is clearly distinguishable from those in which the act of forfeiture is subsequent to the issuance of the policy Here we have to do only with a condition precedent, the enforcement of which renders the policy void and inoperative, if at all, from the date of its issue. If the doctrine of estoppel invoked cannot apply, then the contract sued on must be adjudged never to have had any valid existence, and the rights of the parties are the same as if no policy had ever issued. The assured will then be presumed to have paid his premium for nothing, as a mere donation to the company, without its carrying any hazard. The company

will, under this doctrine, be presumed to have merely accepted the insurance premium in silence, knowing that it parted with no value. Had there been no fire, the company, on its theory, would have kept the premium and have carried no risk. On this theory there is no escape from the conclusion that the insurer was in fact deceived and defrauded, nor that the company purposely confidenced him to the extent of the premium money paid. The facts found by the jury of record, which throw upon the court the duty of passing upon the question of law, establish conclusively the knowledge of the company beforehand of the existing $1,500 policy underwritten by the Fireman's Fund Insurance Company. Had this been the conscious purpose of both parties, then there would have been no need to have put forth the written contract of indemnity signed by the company. The only office of that paper was, under this view, as a device to conceal from the assured the real fact that the company was obtaining the premium without consideration. This doctrine vests in the insurer the power of keeping the premium in case no loss accrues during the term and of escaping liability by returning the premium if a loss shall occur—a power no longer claimed by reputable underwriters anywhere.

It not infrequently occurs that insurance companies making use of the standard form of policy, the form that was employed in this case, increase the amount at risk by issuing new policies upon the same subject of insurance without endorsement of permission upon the first policy, and without making any record thereof upon the recording agent's books. A cause was recently tried in the court where this case originated, where the facts developed that the insurance company issued two policies, one June 9, 1900, and one

September 6, 1900, each for the term of one year; both policies contained a stipulation forbidding other insurance and rendering them void unless consent thereto was endorsed. The insured property was burned at a period when both policies were in force. It was the manifest intention of the company to carry an increased insurance by writing the second policy. The strict construction contended for in this case by the insurer would, in that case, have worked a forfeiture; for the clause here under consideration makes no exception of cases where the additional insurance is taken out at a subsequent date in the same company that issued the first policy. Yet a lawyer of respectability would hardly contend that the policies in the case mentioned had been forfeited by reason of the failure to endorse consent to concurrent insurance in writing upon each policy, notwithstanding that no agent of the insurance company was authorized to change the existing conditions except by writing endorsed upon the particular policy. In such case the mode of acting is not the measure of the agent's authority. The company would be conclusively presumed to have assented to the increase of the insurance, so long as it was itself carrying both policies. The doctrine of estoppel would in such case be effective to prevent the insurer's taking any advantage from the violation of the policy conditioned forbidding other insurance. The case given by way of illustration may not be entirely analogous to that under consideration, yet it involves a similar principle. The business of underwriting is usually entrusted to a person who represents in the same office a number of companies—sufficient to enable him to carry large lines by dividing the risks among the different companies of his agency. It often happens that such agents, when acting in the utmost good faith, omit the written en-

dorsements required by the policy conditions for the carrying of concurrent insurance and that the record of the various policies, spread upon his own register, shows he put forth contracts that, under the rule contended for by the insurer here, never had any existence as binding obligations, notwithstanding the payment of premium and that the policies were intended to take effect at the same moment of time and to be in force for the same term. That was in effect the case here. The assured entrusted the readjustments of his policies to two insurance agents, both of whom knew and were fully advised of the existence of the policy, the previous issue of which is now claimed to work a forfeiture. In such case, the knowledge of the agent entrusted with the power to underwrite the policy, and pass upon the risk and collect the premium, is held to be the knowledge of the company. The issuance of the policy under such circumstances would be a mere idle formality, unless the company intended to carry its portion of the risk concurrently with the other insurers of whose policies it had notice at the time of the execution of its own.

There is no merit in the argument against the application of the doctrine of waiver, based on the fact that its application here involves a holding that the waiver of the condition took place concurrently with the issuance of the policy. The converse of the contention made by counsel is, in fact, true. It is impossible that there could be a waiver of a condition precedent to the attaching of the risk made at any time subsequent to the delivery of the policy. A condition precedent must necessarily affect the validity of a contract, if at all, at the very date of the inception of the contract. If the condition depended upon a subsequent act, then it would not be a condition precedent. The general terms of

policies in use by underwriters are drafted to cover, in a single form, almost every condition that may affect any subject of insurance. Necessarily in almost every policy there are many conditions entirely inapplicable to the subject of the particular risk. For example, in every policy insuring merchandise there are provisions relative to the subject matter of buildings, or real estate, that are intended by the insurer, in advance, to be disregarded or waived, or held wholly inapplicable to every risk other than the class to which they could apply. It not infrequently happens that the ordinary insurance policy, intended to be issued first hand by the first insurer, is used as a re-insurance contract. In such case the forfeiture conditions that would be applicable in favor of the original insurer are disregarded, and the contract held operative only so far as its provisions may reasonably be regarded as germane to a contract of re-insurance. Here, again, the policy stipulations, which from their nature could not reasonably apply to the subject matter of the contract or risk intended to be made or assumed, are treated as waived or as surplusage. The contract of insurance sued on in this case is not an instrument drafted deliberately, after negotiation for a specific contract, and submitted to both parties for execution. On the contrary, it bears the signature only of one of the parties, and embodies many stipulations and provisions not applicable to the subject matter of the particular risk. The form was prepared by the insurer and not by the assured.

It would be manifestly against public policy to permit the insurer under such circumstances to collect premium from the assured under the guise of affording indemnity, and at the same time put forth a contract that on its face was void and of no force or validity. The doctrine of estoppel, held

by the circuit court of appeals, rests upon high grounds of public policy and business morals. Where the company accepts the premium money in silence and leads the assured by its conduct to pay the same in faith of the indemnity offered, it should not, after a loss occurs, be permitted to urge a forfeiture by reason of existing insurance known to it and assented to at the time it went into the venture. In such case, the application of the doctrine of estoppel is obvious and altogether just. A real owner is often precluded from disputing title when by his acts he allows it to appear that the real title is vested in the party making the sale. There is no distinction in principle between such cases and those which hold an insurance company estopped from setting up facts in avoidance of its contract which were obvious and known to its agents when the contract was made.

In view of the finding of the jury that Borgelt was a recording agent with authority to issue policies and accept fire insurance risks and collect and receive premiums therefor, it is not deemed necessary to discuss at great length the point made by counsel for the company, based on the assumption that Borgelt was an agent with limited powers. Under the special findings, it is evident that the agent here was authorized to exercise all the powers of the company with respect to risks. What might have been the rule had he been a soliciting agent we need not inquire. The powers defined in the findings are general and not restrictive powers. Borgelt stands for the company in all things regarding underwriting and represents all its powers of contracting risks. All the assured is interested to show in this case in order to sustain his contention is that Borgelt was vested with power to accept the risk with or without concurrent insurance. He was the examiner passing upon the risk, through whom

alone the company could be affected with notice of other insurance then subsisting. If this power be a restricted or limited one, it is, nevertheless, the only power which the circumstances of the assured's case required the agent to exercise.

The authorities hereafter cited will indicate how the text-writers and the courts of the country, state and federal, have held upon the contention of the assured, as heretofore stated and argued.

Before proceeding, however, to collate the authorities, we wish to contest the further contention of the counsel that the assured should be denied relief here because the action is at law rather than in chancery. This contention is also based on the rule in the *Carpenter Case*, where the court instructed the jury that "at law, whatever might be the case in equity, mere parole notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on." In so far as the *Carpenter Case* speaks on this question, the rule announced seems to rest largely on the recognition of the chancery court as a distinct forum, having the exclusive power to grant relief in cases of this character. There is no reason for the application of that rule to this particular case. This case originated in the district court of Lancaster county, Nebraska. By federal statute, therefore, the laws of Nebraska are to be regarded as the rules of decision in the trial of the case at common law in the courts of the United States (Rev. St. U. S., sec. 721). In this jurisdiction, the practice is regulated by the code of civil procedure, section 2 of which is as follows:

Sec. 2. The distinction between actions at law and suits in equity and the form of all such actions and suits heretofore

existing are abolished and in their place there shall be hereafter but one form of action, which shall be called a civil action.

It is not contended that by this statute the distinction between common law and equity is entirely abolished; but, under the code, relief in cases of this character is, in the jurisdiction where the case originated, granted in an action at law. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins. Co. v. Covey*, 41 Neb., 728; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566). The rules of practice prescribed for the state courts being such as to permit the granting of relief in the action in the form in which it was instituted, the company that removed the case has no standing to claim a reversal on the question of practice alone, where such contention to prevail would involve a departure from the rules of practice of the state court.

THE FEDERAL DECISION.

This court in the case of *Insurance Company v. Wilkinson*, 13 Wall., 232-236, in a well-considered opinion by Mr. Justice MILLER, held that where an insurance agent soliciting insurance prepares the application of the insured, he is the agent of the insurer and that, although the application be signed by the assured, he is not bound by false statements embodied therein. It was further held that in such case the insurer cannot protect himself by limitations upon the agent's authority to the effect that he is only agent for the purpose of receiving and transmitting the application and the premium. The doctrine of estoppel was held to apply against the insurer and oral testimony was held admissible. This court held in favor of the modern or advanced doctrine

applicable to the business of underwriting and repudiated the earlier doctrine. In the opinion (pp. 233-236) it is said:

It is in precisely such cases as this that the courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country. Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. * * *

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting his eyes to it, that in-

surance companies organized under the laws of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said and done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, lead, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agents are, *prima facie*, coextensive with the business intrusted to his care, and will

not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.

In the fifth edition of the American Leading Cases, after a full consideration of the authorities, it is said: "By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not infrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally proceeding from the insured, be regarded as the act of the insurers." The modern decisions fully sustain this proposition, and they seem to be founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

In *Insurance Company v. Norton*, 96 U. S., 234–244, the company claimed the forfeiture under its policy conditions on account of the non-payment of the premium note. This court in that case held, however, that the forfeiture condition could be waived by the company; that the declaration contained in the policy to the effect that the agent had no

power to make agreements to waive forfeiture was not conclusive and the parole evidence was admissible, notwithstanding the policy condition, to establish a waiver. In the opinion by Mr. Justice BRADLEY, it was said:

The written agreement of the parties, as embodied in the policy and the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purpose that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter, or abrogate contracts or waive forfeitures. And these terms, had the company so chosen, it could have insisted on. But a party always has the option to wai 'e a condition or stipulation made in its own favor. The company was not bound to insist upon a forfeiture, though incurred, but might waive it. It was not bound to act upon the declaration that its agents had no power to make agreements or waive forfeitures; but might, at any time, at its option, give them such power. The declaration was only tantamount to a notice to the assured, which the company could waive and disregard at pleasure. In either case, both with regard to the forfeiture and to the powers of its agent, a waiver of the stipulation or notice would not be repugnant to the written agreement, because it would only be the exercise of an option which the agreement left in it. And whether it did exercise such option or not was a fact provable by parol evidence, as well as by writing, for the obvious reason that it could be done without writing. * * *

Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in *Statham's Case* (93 U. S., 24), that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given,

the courts should be liberal in construing the transaction in favor of avoiding a forfeiture.

Eames v. Home Insurance Company, 94 U. S., 621-630, was an action in chancery to decree execution of a policy and enforce payment of a loss. The opinion discussed and ruled upon the point involved here. Among the defenses were an alleged misrepresentation of title and the existence of collateral insurance incorrectly stated in a written application, signed by the assured. It appeared, however, that the facts had been fully reported to the company's agent. The knowledge of the agent was held to be the knowledge of the company and the insurer was held bound by his acts. In the opinion delivered by Mr. Justice BRADLEY, it was said:

As to the objection that the application in this case does not truly set forth the title of the complainants and the amount and nature of the incumbrances on the property, and the amount of insurance in other companies, it is sufficient to say that the evidence abundantly shows that all the facts were fully and frankly communicated to Beach, the agent of the company, and were indeed known to him before; and that he wrote down the answers according to his view of their bearing and legal effect, Eames relying entirely on his experience in such matters. There is no reason to suppose that either Eames or Beach did not act in entire good faith in the transaction. And, indeed, it cannot be pretended that the facts were not substantially as represented in the application. The complainants are represented to be the owners of the property, which is stated to be subject to a mortgage for $6,000. The fact was, that they had purchased the property for $12,000, and had paid $6,200 of the purchase money, the vendor having a lien for the balance of $5,800; but no deed had ever been given. So that, in truth, the complainants did not hold the legal

title, although they had an equitable one; and had not given a mortgage, although the vendor's lien was equivalent to one. In another answer, however, explaining the mortgagee's interest, it is stated expressly to be a "lien on mill to secure payment of sale." As the exact facts were communicated to the agent, and he took the responsibility of stating them in the way he did, leading the applicant to suppose that it was all right, we think it would be great injustice to turn him out of court now for this inexact method of statement. According to the views expressed by this court in *Insurance Company v. Wilkinson*, 13 Wall., 222, and other more recent cases, the defendant was concluded by the act of its agent. The reference to collateral insurances in other companies is subject to the same consideration. The insurances were being applied for through this very agent who wrote the answers, and who knew the whole facts, and between whom and the general agent they had been referred to in their correspondence. The defense on this ground is utterly destitute of equitable consideration.

Hartford L. & A. Ins. Co. v. Unsell, 144 U. S., 439–451, was a case of delayed payment of a renewal premium under a policy conditioned that it should be inoperative unless the renewal premium was paid on a given day. Notwithstanding the policy condition, the jury was permitted to render a verdict against the company on the ground that the company had waived the policy condition. The instruction reviewed, and the ruling of this court, sufficiently appear in the following quotation from the opinion written by Mr. Justice HARLAN:

But the part, and the only part, of the charge to the jury to which the defendant excepted was in these words: "But the plaintiff says, that beyond these receipts of money after the day specified there were instances in which money was received without any such notice. Now the question comes

up in respect to that, was there such a continuance of business, was the whole course of business, from the commencement to the close, such that from this and that, and from all the receipts and all the transactions he had a right to believe and did believe that the question of health even would not be considered, and that it would be willing to take his money shortly after it had become due without inquiry as to his health? If so, that makes a waiver. If the company, by its conduct, led him, as a reasonable and prudent business man, to believe that he could make payments a few days after, sick or well, it cannot turn around now and say, 'You did not pay at the time.' I cannot say to you, as a matter of law, that one receipt, after the time specified, would make a waiver, or that fifty would. It is not in the numbers. The question is for you to consider and determine from all of them and from the whole course of business, whether, as a prudent business man, he had a right to believe that it was immaterial whether he paid on the day or a few days later. If the course of conduct was such that he had a right to believe that he could pay only in good health, then there was no waiver applicable to the case at bar. It must have been such a course of conduct as would lead a reasonably prudent man to believe that the company was willing to take payment, sick or well."

The law applicable to the case was stated to the jury with substantial accuracy. It is a mistake to suppose that the charge was inconsistent with the principle announced in *Thompson v. Knickerbocker L. Ins. Co.*, or in any other case decided by this court. In the case of *New York L. Ins. Co. v. Eggleston*, 96 U. S., 572, 577 (24:841, 843), Mr. Justice BRADLEY, speaking for the court, said: "We have recently, in the case of *Knickerbocker L. Ins. Co. v. Norton*, 99 U. S., 234 (24:689), shown that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or any agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action, on

the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract. The company is therefore estopped from enforcing the forfeiture."

While this court has not, since the decision in *Carpenter's Case* in 1842, followed that precedent upon the point involved in this case, it has in many cases and in particular those above cited, announced doctrines altogether inconsistent with that decision. In *Wilkinson's Case* (13 Wall., 232) it has expressly approved of the introduction in modern times in courts of law of the doctrine of equitable estoppels. In *Eames's Case* (94 U. S., 621) which was in chancery, it was held that collateral insurance was no bar to a recovery when the agent who took the application was the same agent through whom the collateral insurance was obtained and who knew the whole facts. In *Norton's Case* (96 U. S., 234) it was held that the declaration contained in the policy limiting the power of the agent was not conclusive and the powers might be extended by parol proofs; and in effect the same doctrine was re-affirmed in *Unsell's Case* (144 U. S., 439). In *Wilkinson's Case* the opinion is expressly a departure from the earlier doctrine announced in *Carpenter's Case*, although *Carpenter's Case* is not specifically mentioned or overruled. In the case at bar, the failure to make the endorsement in writing upon the policy, permitting concurrent insurance, was the company's own fault and not the fault of the assured. It is, therefore, not surprising that the circuit court and the circuit court of appeals have, in view of the decisions above referred to, refused to declare a for-

feiture where the grounds on which the forfeiture is asserted are based upon the neglect of the company's own agent. Nor is it strange that the inferior courts have treated the holding in *Carpenter's Case* as obsolete. With this review of the decisions of this court, we present the cases in the federal courts inferior to this court.

In *Putnam v. Ins. Co.*, 18 Blatch., 368, 4 Fed., 754, Mr. Justice BLATCHFORD (then circuit judge) held in the Northern District of New York that the delivery of a policy with knowledge by the agent of existing insurance was a waiver of the provision of the policy prohibiting additional insurance; and on findings similar to those made by the jury here, judgment was rendered against the insurance company. The case is well considered and is of value because of the great learning of the judge who made the ruling. We find no intimation that during his subsequent service on the supreme bench he ever renounced the views there expressed upon this subject. In the opinion it is said:

On the whole evidence the case is not one for disturbing the finding of the referee that the fact of the existence of the $6,000 other insurance was known to the agent of the defendant when he delivered the policy in suit to the plaintiff. This fact being so, it must be held that the conclusion of law thereon by the referee was correct. The case of *Whited v. German Fire Ins. Co.* (76 N. Y., 415), decided in March, 1879, is a direct authority in point. The policy there contained provisions that, if the property should be sold or if the interest of the assured should not be truly stated, the policy should become void; that any less than a distinct specific agreement endorsed on the policy should not be construed as a waiver of any condition therein; and "that any person other than the assured who may have procured the insurance to be taken shall be deemed to be

the agent of the assured and not of the company under any circumstances whatever or in any transaction relating to this insurance." The policy was issued in 1869, signed by the officers of the company and countersigned "O. J. Harmon, Agent," and was for one year. In 1870 it was renewed for one year, the renewal certificate being signed by the officers and containing the words "not valid unless countersigned by the duly authorized agent of the company at Oswego" and being countersigned there "O. J. Harmon, Agent." Like proceedings took place on a renewal in 1871 for one year. During that year the plaintiff conveyed the premises and took back a mortgage on them. Before the year expired, he applied to Harmon for a renewal and then told Harmon, "the person who had as defendant's agent countersigned the policy and the two renewal certificates," that the premises had been sold and to whom and showed him the mortgage and paid the premium. Harmon said to the plaintiff that he would "make it all right" and gave him a renewal certificate signed and countersigned like the former ones. Harmon was the duly authorized agent of the company at Oswego and did all the business of it there, except settling losses. In the present case, Carr says: "I received applications for policies and had authority to write and issue policies without writing to the company." In the *Whited Case*, the interest of the plaintiff in the premises as a mortgagee was not stated in the policy or in the renewal certificates. The defendant contended that the policy was void. The plaintiff contended that there had been a waiver of the requirement that the change of interest of the plaintiff should be endorsed on the policy. The defendant replied that Harmon could not bind the defendant by any such waiver. The court says: "Upon the facts in the case, as stated by the verdict, there was a parol waiver of the conditions rested upon by the defendant and a parol consent to keep on foot the insurance of the plaintiff in his new status of mortgagee; that Harmon was the agent of the defendant in the dealing for the last renewal and not the agent of the plaintiff." (*Fish*

v. Cottenet, 44 N. Y., 538; *Shearman v. Niagara Fire Ins. Co.*, 46 Id., 526; *Pechner v. Phœnix Ins. Co.*, 65 Id., 195; *Van Schaick v. Niagara Fire Ins. Co.*, 68 Id., 434; *Bidwell v. No. West Ins. Co.*, 24 Id., 302.)

In *Glover v. National Fire Ins. Co.*, 30 C. C. A., 95-103, the circuit court of appeals for the fourth circuit held that an insurance company is estopped to rely on a mis-description of a property, when the application was prepared by its agent, who had authority to issue the policy and who knew the actual facts concerning the property. The subject of the insurance was reported to the company by its own agent and described in the policy as a dwelling. It was, in fact, a Keeley Institute. Proof was offered to show that the character of the occupancy was known to the agent at the time he wrote the policy and the point was made that the company, having knowledge of the facts before it issued the policy, was estopped to claim a forfeiture because the risk was more hazardous in fact than that described in the application and the policy. In the opinion commenting on the rule that an insurance company is estopped from asserting the invalidity of its policy from date of issue for violation of conditions, if the fact of such violation was known to the company or its duly authorized agent, the court said:

This principle, which seems to have the sanction of all the writers on insurance, is consonant with sound reason. All of the business of insurance is done through agents, who are presumed to know and do know better than the community at large, the requirements of their companies. A party seeking insurance must ordinarily depend upon the agent for the proper preparation of the requisite papers and, if he neither misrepresents nor conceals any essential fact and the agent, having opportunity of knowing, acts upon his own knowledge and fails to describe properly the prem-

ises insured, it would be an intolerable hardship that such party, who is without fault himself, should suffer from the omission or negligence of the company's agent and that the company, which has taken his money and issued to him a policy void from the beginning, should be allowed to shelter itself under the letter of the contract and the insured not be permitted to show the truth of the transaction. The general practice is for the party seeking insurance to make out his application and this is considered a part of the policy. This was not required or done in the case under consideration. The plaintiff was not asked to describe the property and it is not claimed that he omitted to give any information or that the misdescription was his act. The word "dwelling" is not free from ambiguity. In a certain sense, any house in which people dwell might be considered a "dwelling." That a higher premium would be charged on a house where patients of a Keely cure were entertained, was a fact peculiarly within the knowledge of the insurance agents. It is not a matter of common knowledge and the plaintiff has testified that he did not know it. The description was written by the company's agent. The testimony shows that the policy was made out after the plaintiff had left the city and was never seen by him until after the fire. It is true that it was left with Mr. Carter, who was in a sense his agent, as well as attorney for the Jacksons, and that any knowledge that Carter would obtain from inspection of the policy would be imputed to the plaintiff; but it does not seem to us that it would be any relaxation of the good and wholesome rules which require integrity and fair dealing and openness of conduct on the part of the insured, as well as upon the part of the insurers, to hold that the plaintiff was entitled to show by parol that the agents, at the time the policy was written, were acquainted with the use which the plaintiff was making of the premises insured and, if so, that the company was estopped from setting up such use in avoidance of its liability.

Under the general principle of estoppel in pais, persons

innocently induced to acquire rights in derogation of secret or undisclosed claims of those who induce such action, are secure in the rights so acquired. A real owner is often precluded from disputing title when by his acts he allows it to appear that the real title is vested in the party making sale. There can be no real distinction between such cases and those which would hold an insurance company estopped from setting up facts in avoidance of its contract, when such facts were obvious and were known to its agents when the contract was made. That oral testimony may be properly offered to prove facts tending to create estoppels of this nature is well settled in numerous cases of the highest authority. In *Ins. Co. v. Wilkinson*, 13 Wall., 222, there was a suit upon a life insurance policy. It was not denied that the application upon which the policy was issued, contained a representation of a matter material to the contract, that it was signed by the party, and that it was untrue, the applicant having signed a paper stating that the mother of the insured had died of fever at the age of 40, when, in fact, she had died of consumption at the age of 23. Testimony was offered and admitted that the plaintiff had said that he had no knowledge on this particular subject of inquiry, and the representation was made out by the insurer. The court held that it would be an act of bad faith and of the grossest injustice and dishonesty to avoid the policy because of this statement, and Mr. Justice Miller, with his accustomed force and clearness, states the grounds upon which oral testimony may be offered, not to contradict a written instrument but to show that it cannot be lawfully used against him. This case is cited by Mr. Justice Bradley in *Eames v. Ins. Co.*, 94 U. S., 621, a fire insurance case where the agent, being acquainted with the exact facts, stated them inexactly, leading the applicant to suppose that it was all right. The court held that it would be great injustice to turn him out of court for this inexact method of statement. In *Ins C. o. v. Mahone*, 21 Wall., 152, the supreme court sustains the rule of the court below as to the admissibility of parol testimony to show that the answer

to a certain inquiry propounded by the insurance company's agent, was different from that taken down by the agent and signed by the insured. True answers having been made in fact, the company was not permitted to set up as a warranty the answers put down by its agent, although signed by the assured.

In *Fireman's Fund Ins. Co. v. Norwood*, 16 C. C. A., 136, it was held in the circuit court of appeals for the eighth circuit that where the agent issuing the policy had knowledge of the purpose of the assured to take out other insurance, the company would be estopped by the knowledge of its agent, acquired previous to the issue of the policy, to claim a forfeiture under the policy condition of the standard form of policy forbidding other insurance. It is true that the facts of the Norwood case were not such as to necessarily call for the application of the principle contended for in this case. There the policy was a valid and subsisting contract when issued, and the fact on which the forfeiture was claimed was procuring of insurance subsequently in excess of that permitted by the endorsement. The claim of forfeiture in that case rested, therefore, upon the subsequent act of the assured himself. We must confess our doubt as to the propriety of extending the rule in that case so as to make it applicable to insurance subsequently procured by the act of the assured. In most jurisdictions a distinction is made between the cases where the additional insurance is subsisting and known to the agent writing the policy and cases where it is afterwards procured. In the former case the company induces its patrons to part with the premium money in faith of the indemnity offered, retaining the consideration till after loss; so that the application of the doctrine of estoppel is manifest and is now universally held in

order to avoid the fraudulent issuance of a policy known to be void at its inception. In the latter case, however, of insurance taken out subsequently, the policy is valid in its inception, and it is a subsequent act of the insured that avoids the policy. We are convinced that in the latter case the right of the company to contract against subsequent increase of insurance may well be upheld without conflicting with the rule universally applied in the former case. There was a minority opinion in *Norwood's case*, contending for a recognition of this precise distinction. The opinion by CALDWELL, circuit judge, in *Norwood's case*, contains an extended discussion of the authorities and supports the doctrine of estoppel, which was, in fact, applied in the case at bar. He shows that the earlier doctrine, as announced in *Carpenter's Case*, has been repudiated by the courts of the country, including the court rendering that decision; and that, while the state courts formerly held to the doctrine of *Carpenter's Case*, they have now all yielded to the modern doctrine, except Massachusetts and Rhode Island. The Rhode Island court in the last case before it (*Reed v. Ins. Co.*,24 Atl., 833), held to the rule solely on the ground that the previous decisions of that state had committed the court to that doctrine, and in the opinion used the following language: "But however this may be, we recognize the tendency of decision in favor of the insured, and, if it were a new question in this state, we might feel compelled to yield to the weight of authority.

We quote the following from the opinion of CALDWELL, C. J. (16 C. C. A., 140):

It is contended that consent to other insurance can not be proved by oral evidence: First. Because the policy provides that it shall be in writing endorsed on the policy; and

Second, because it would violate the rule against the reception of oral evidence to contradict or vary a written instrument. But it has been authoritatively decided that a contract of insurance is not within the statute of frauds and may be by parol (*Commercial Ins. Co. v. Mutual Ins. Co.*, 19 How., 318; *Insurance Co. v. Shaw*, 94 U. S., 574; *Henning v. Ins. Co.*, 2 Dill., 26; Fed. Cas. No. 6, 366); and if it can be made by parol, it can be varied by parol. Parties to contracts can not disable themselves from making any contract allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol and a parol one changed by a writing, despite any provision in the contract to the contrary. * * * Nor can parties by their contracts deprive themselves of the right to prove their cause of action or defense by any species of evidence which the law declares to be competent and legal. The application of this doctrine is not always invoked in the interest of the insured. It is applied for the protection of the insurer as well. * * * Parol evidence that the company had knowledge of and consented to other insurance is not introduced to contradict or vary the written conditions. It is everyday practice to receive parol evidence to establish or overthrow written instruments, or to show that some claim based thereon has been waived by the party claiming under it, or that he has so acted towards the other party that he is estopped from setting up the claim. In all cases the existence of the contract is neither denied nor its terms sought to be varied by parol. The condition in this policy is admitted, but the insured says the insurance company, by delivering the policy and receiving the premium thereon with notice of the other insurance then existing or thereafter to be obtained, thereby gives its consent to such other insurance and asserted the validity of the policy, and it can not be heard after the loss to say that the policy is void." "This act," says the New York court of appeals, "may be called a waiver or may be treated as an estoppel." (*Pitney v. Ins. Co.*, 65 N. Y., 6.) The company can not play

fast and lose. It can not issue a policy which is valid for the purpose of receiving the premium, but invalid when it comes to pay a loss. * * *

Ample authority is cited in the opinion to support the assertion therein made that "the early doctrine on this subject has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete."

In *Northern Assur. Co. v. Grand View Bldg. Ass'n*, 41 C. C. A., 207 (the case at bar, printed record 38), the doctrine of estoppel was correctly applied in a well considered opinion by Circuit Judge THAYER.

In *London & L. Fire Ins. Co. v. Fischer*, 34 C. C. A., Circuit Judge TAFFT, delivering the opinion for the circuit court of appeals of the sixth circuit, said:

We think the judgment must be affirmed. It is well settled in the law of fire insurance that the insurer is estopped to plead as a defense the breach of conditions against other insurance or encumbrance without the consent of the company in writing on the face of the policy, if it appears that when the agent of the company, with authority to deliver or withhold policies, delivered the policy in question, while he knew of the existence of the other insurance or an encumbrance. In *Ins. Co. v. Norwood*, 32 U. S. App., 490, 16 C. C. A., 136, 69 Fed., 71, which was decided by the circuit court of appeals for the eighth circuit, it was held that where the agent was advised by the insured at the time of the issuance of the policy that he intended to take out other insurance, the estoppel would apply. Judges Caldwell and Thayer upheld this view. Judge Sanborn dissented on the ground that the rule did not apply to the knowledge of the agent of the intention on the part of the insured to take out other insurance in future, but only to knowledge of existing insurance at the time the policy was issued. But the prop-

osition formulated above and which goes as far as is needed to sustain the charge of the court below, was expressly approved not only by the majority of the court but also by the dissenting judge. Other instances sustaining this doctrine are *Putnam v. Ins. Co.*, 4 Fed., 753 (a decision by Mr. Justice Blatchford, then circuit judge); *Whited v. Insurance Co.*, 76 N. Y., 415; *Insurance Co. v. Hick*, 125 Ill., 361, 17 N. E., 792; *Insurance Co. v. Copeland*, 86 Ala., 551, 6 South, 143; *Patten v. Insurance Co.*, 40 N. H., 375-381; 1 May (3d ed.), 294*c*; 2 May, Ins., 372*c* and cases there cited. There was, therefore, no error in the charge of the trial court upon this point.

McElroy v. British American Assur. Co., 36 C. C. A., 615, and *Palatine Ins. Co. v. McElroy*, 40 C. C. A., 441, are companion cases, decided by the circuit court of appeals for the ninth circuit. The first case cited reviews the authorities and holds to the doctrine that where the agent at the time he writes the policy has knowledge of an encumbrance on the property, or that the assured has procured or arranged to procure concurrent insurance thereon, his knowledge binds the company and it is estopped to claim the invalidity of the policy on such grounds, notwithstanding any provision of the policy in that regard. The case embodies also a direct ruling in favor of the admissibility of parol proofs in such cases.

THE STATE DECISIONS.

Counsel for the company is peculiarly unfortunate in his citation of cases from the court of appeals of *New York* to sustain a forfeiture of the policy in this case. That court has uniformly held, both before and since the adoption of the standard form of policy, to the doctrine of estoppel invoked here by the assured. (*Pitney v. Ins. Co.*, 65 N. Y., 6;

Pechner v. Ins. Co., 65 N. Y., 195; *Short v. Ins. Co.*, 90 N. Y., 16; *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 484; *Wood v. American Fire Ins., Co.*, 149 N. Y., 485).

In *Quinlan v. Providence-Washington Ins. Co.*, 133 N. Y., 57, cited in the brief of the opposing counsel, the acts occasioning the forfeiture were subsequent to acceptance of the risk and delivery of the policy. The doctrine announced in that case holding the assured bound by his own acts subsequent to the taking out of his insurance, has no relevancy to the point here presented for decision. There the policy was admittedly valid at date of issue but was subsequently rendered invalid by institution of foreclosure proceedings in violation of a policy condition. In *Moore v. Hanover F. Ins. Co.*, 141 N. Y., 219, the other New York case cited in the brief of the company here, a forfeiture was adjudged on like grounds, so neither of these cases furnishes a precedent on the question here under consideration. The assured here does not contend that such policy stipulations are ineffective to work a forfeiture by some subsequent act or conduct of his own. The supreme court of Nebraska might have been cited to the same doctrine (*German Ins. Co. v. Heiduk*, 30 Neb., 288). Yet the Nebraska court, like that of New York, uniformly applies the doctrine of estoppel in cases where the claim of forfeiture is grounded upon some fact respecting the risk actually known to the agent beforehand or at the time of the execution and delivery of the policy. The latest expression of the New York Court of Appeals made since the adoption of the standard policy in that state, is to the effect that the doctrine of estoppel, applicable in such cases, has not been shaken by any decision of that court made since the adoption of the standard policy. We quote only from two cases decided by that court.

In *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y., 484, it was said by MARTIN, J.:

Hence the precise question is whether the policy was valid if the defendant's agent knew of the existence of those facts. Having knowledge of all the facts concerning the property and chattel mortgage, unless he intended to waive the condition of the policy relating to mortgaged personal property, or through mistake omitted to make the proper endorsement, he must have intended to commit a fraud upon the plaintiff. Under these circumstances it is to be presumed that if anything was omitted which was necessary to make the policy valid, it was by mistake, or that the condition was waived, or the defendant held itself estopped from setting it up. * * * The rule that an insurance company will not be permitted to defeat a recovery upon a policy issued by it proving the existence of facts which would render it void, where it had full knowledge of them when the policy was issued, is too well established by the authorities in this state to require further discussion. * * * Whether the decisions in this class of cases proceed upon the charitable theory that the insurance company by mistake omitted to make the required endorsement, or intended to waive the provision regarding it; or upon the idea that its purpose was to defraud the insured, and is for that reason estopped, is of but little consequence, as any one of these theories is sufficient to avoid the defense relied upon in this case. That the knowledge of the defendant's agent was its knowledge, is also established by the authorities cited.

In *Wood v. American Fire Ins. Co.*, 149 N. Y., 385, 386, it was said in the opinion by O'BRIEN, J.:

That general agents of an insurance company may waive stipulations and provisions contained in the policy with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it with knowledge of all the facts and receiving

the premium, has long been settled. It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception and which he knew at the time he delivered it and accepted the benefits were contravened by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary. The principle is not a new one, and it has not been shaken by any decisions of this court made since the adoption of the standard policy. * * * The restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums with full knowledge of the actual situation. To take the benefit of a contract with full knowledge of all the facts and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party.

It is true, as asserted by counsel for the company in his brief, that the supreme court of *Kansas*, where the *Norwood Case*, decided in the circuit court of appeals of the eighth circuit, originated, refused to follow the federal holding. It is not true, however, that the Kansas court ruled against the doctrine of estoppel as sought to be applied in the case at bar. On the contrary, that court has expressly held in favor of the contention of the assured here. The court of that state, in the case cited (*Commercial Union Assur. Co. v. Norwood*, 47 Pac., 529), merely distinguished between the cases where there is a knowledge of the existence of the fact at the time of issuing the policy, and cases which relate to some anticipated future action not affecting the validity of the

policy at date of issuance. In that particular, the Kansas court simply adheres to the doctrine obtaining in New York and in Nebraska. From the opinion in the case cited, we quote the following:

We are entirely satisfied with the law as declared in all the cases heretofore decided by this court, cited on behalf of defendants in error. The difficulty in this case is that there is no proof, either of the existence of insurance on the property in excess of the amount authorized at the time the policy was issued, or that the company or its agents was informed at any time before the fire of the full amount of insurance taken out. * * * It was incumbent on the plaintiffs, when seeking to charge the insurance company with knowledge that the property was insured at the time the policy was issued, to an amount exceeding that authorized by the consent indorsed on it, to prove the fact. * * * We think there is a clear distinction between a case where there is a knowledge of the existence of a fact which would avoid the policy, and this in which it merely claimed that there was a prior agreement contradicting the terms of the written contract as to the amount of insurance the party should be permitted to carry. (*Ins. Co. v. Norwood*, 47 Pac. [Kan.], 529.)

The Kansas court has before and since the ruling in *Norwood's Case* uniformly held that where an insurance company had notice at the time a policy was issued of subsisting additional insurance it was estopped from setting up a violation of a clause prohibiting prior additional insurance without its assent. (*Magora Fire Ins. Co. v. Johnson*, 45 Pac., 789; *Home Ins. Co. v. Wood*, 28 Pac., 167; *State Ins. Co. v. Gray*, 44 Kas., 731; *National M. F. Ins. Co. v. Barner*, 41 Kas., 161.

Missouri also has abandoned the rule as announced in that court in the case of *Hutchinson v. Western Ins. Co.*, 21

Mo., 97, cited in behalf of the insurance company in its brief, and now holds to the contrary rule. In his citation of this precedent, counsel has again adopted the odious practice of referring to overruled cases instead of authoritative precedents.

Hamilton v. Ins. Co., 94 Mo., 353, was a case in which the insured had procured policies in two different companies. The agent of the company contesting the loss had notice of the existence of the other insurance. In the opinion of the court by Judge SHERWOOD (p. 368] it is said:

If he (the agent) had notice of other insurance and took no steps to cancel the policy in suit, then the fact of such other insurance would constitute no defense to plaintiff's policy and this upon the familiar principle that notice to the agent is notice to the principal and what the agent waives, the principal cannot afterwards insist upon, and in cases of insurance that an agent when notified gives verbal assent to or makes no objection, the principal cannot afterwards, when suing on the policy, make the point that other or further insurance was not endorsed upon the policy. In such circumstances, failure of literal compliance with the stipulations in the policy will not be allowed to work a forfeiture and the company is wholly estopped from making such a claim. This is the decided tendency of modern adjudications.

In *McCullum v. Hartford Fire Ins. Co.*, 67 Mo. App., 76, Judge BOND, in delivering the opinion of the court, said:

The fact is indisputable that the second policy was procured by plaintiff from the same agent who represented defendant in the issuance of the policy in suit, and who was defendant's agent to issue policies at the time of procurement of the second policy. This effected defendant with notice in law of the fact of the issuance of the second policy and defendant's failure thereafter to signify an intention to cancel its policy or claim a forfeiture by reason of such additional

insurance contrary to its provision, estops it to make such claim in the present action.

It requires some assurance on the part of the counsel for the company to contend in his brief that the ruling adopted by the *California* Supreme Court is in favor of his contention. That court has recently, after a very exhaustive and and full consideration of the authorities, held in harmony with other courts of the country in favor of the application of the doctrine of estoppel to prevent a forfeiture based on facts known to the insurance agent at the time of writing the policy and collecting the insurance premium. This question is no longer open to controversy in that jurisdiction.

Farnum v. Phœnix Ins. Co., 83 Cal., 249-263, is the case referred to in the preceding paragraph. It distinguishes between the effects of acts of agents which operate as waivers of conditions precedent to the attaching of the risk, and the cases in which it has been sought to apply the same rule to subsequent violations by the assured of the policy conditions. The discussion in this case of the powers of local agents generally, entirely dissipates the argument of counsel based upon the two earlier cases cited from that state. In the opinion it is said:

And it has been repeatedly held that where any fact which would constitute a breach of a condition precedent to any liability of the company on the policy is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy as a valid and completed contract is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers of conditions expressed in the policy shall be in writing en-

dorsed on the policy. * * * It is also well settled, that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it cannot by its agents make an oral contract or an oral waiver not forbidden by the statute of frauds.

The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory, stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent. In this case, the circumstance that the company had general agents for the state located at San Francisco does not affect the question, since it conferred its whole power in regard to the policy in question upon its agent at Stockton, who appears to have received his appointment and instructions directly from the home office, in the state of New York, and who signed himself as the direct agent of the defendant. Of the authorities hereinbefore cited, the following directly affirm the ostensible power of such local agent to bind the company by waiver of any condition precedent to its liability and to dispense with the requirement that such waiver shall be in writing indorsed on the policy, so far as to estop the company from questioning its original liability on the ground that the waiver made at the time of delivery of the policy was not indorsed upon it: citing many cases.

While we might content ourselves with the citation of the opinion authoritively settling the matter in California, it is nevertheless worthy of remark that the earlier cases cited by counsel from that state do not, in fact, support his contention. In *Gladding v. California, etc., Ins. Ass'n.*, 66 Cal., 6, the ground of forfeiture was that after the policy was is-

sued, assured permitted a third party to store hay in a shed adjoining the insured property. The policy when issued was admittedly valid, and the ground of contest was based on the subsequent acts of the assured. In the other California case, *Enos v. Sun Ins. Co.*, 67 Cal., 621, the question was whether a policy stipulation against a building becoming vacant or unocupied had been violated, the subject of insurance being a fishing scow. Neither case has any application here.

In *Gardner v. Ins. Co.*, 38 Me., 441, cited in the company's brief in support of its contention, the policy was admitedly valid when executed. A forfeiture was claimed for nonperformance of a rule embodied in the by-laws of a mutual company, requiring the assured to give notice to the secretary of any material increase of risk. The mere statement of the case will show that it does not, in any particular, involve the principle that must determine the present suit. There it was the neglect of the assured, holding a policy valid when issued, to report a subsequent material change in the risk that worked a forfeiture. For many years a statute in Maine has been operative to overthrow the odious rule of forfeiture held in the earlier decisions. Under the statute, the rule in that jurisdiction is in harmony with the contention of the assured in this case. That court has, in fact, been almost intemperate in the severity of its language used to condemn illegitimate practices in underwriting, which took from the assured his premium money, while securing to him nothing better than an unsuccessful lawsuit in addition to the loss of his property. (*Day v. Dwelling House Ins. Co.*, 81 Me., 244; *Packard v. Dorchester M. F. Ins. Co.*, 77 Me., 144; *Caston v. Monmouth M. F. Ins. Co.*, 54 Me., 170; *Emory v. Pescataqua F. M. Ins. Co.*, 52 Me., 322.)

In *Hilton v. Phenix Ins. Co.*, 92 Me., 272, the policy was conditioned that it should be void as to vacant property. It covered two buildings, one of which was vacant, with the agent's knowledge, at the date of issuance of the policy. Judge SAVAGE, in the opinion of the court holding the company liable, said:

There is much more ground for saying that this defendant was deceived by its agent, than there is that the agent was deceived by the plaintiff. Though he had never seen the plaintiff or the premises, the agent reported to his company that he had personally examined the premises "a few days since." We must hold that their agent's knowledge was in law the knowledge of the defendant.

In *Ruthven v. American Fire Ins. Co.*, 92 Ia., 316, cited also in the brief of counsel in support of the company's contention, the question arose after loss as to authority of an agent, empowered to underwrite policies, to bind the insurer by waiver of formalities required in relation to settlement of losses—a matter by uniform usage entrusted to another and a special class of agents. The holding is doubtless correct, but no rule there announced can have any application to the point raised on this record. On the specific point involved in the case at bar, the court of Iowa has held flatly in favor of the contention of the assured, and has applied the doctrine of estoppel in those cases where the breach of the policy conditions rests upon a fact known to the agent and assented to by him at the time he accepted the risk and wrote the policy.

In *Miller v. The Hartford Fire Ins. Co.*, 70 Ia., 704, it was claimed as a defense to the policy that the assured made a false statement as to other insurance. It was developed on the tri[illegible] however, that the agent had knowledge of the other

insurance. In disposing of this point, Judge SEIVERS, in his opinion, said:

It is understood that there was other insurance on at least a portion of the property insured, and it is contended that the assured made a false statement in relation thereto when he applied for and obtained the policy in question. It is by no means certain that any such statement was made. The agent of the company was fully informed as to the existence of the other insurance and the terms and conditions of the policy, and, therefore, we think the company is bound by the knowledge of its agent.

Numerous other decisions of the Iowa court hold to the same or analogous doctrines. (*Bennett v. Council Bluffs Ins. Co.*, 70 Ia., 600; *Myers v. Council Bluffs Ins. Co.*, 72 Ia., 176; *Siltz v. Hawk Eye Ins. Co.*, 71 Ia., 710; *Jordan v. State Ins. Co.*, 64 Ia., 216; *Boettcher v. Hawk Eye Ins. Co.*, 47 Ia., 253; *Miller v. Mutual Benefit Life Ins. Co.*, 31 Ia., 216; *Key v. Des Moines Ins. Co.*, 77 Ia., 174.)

Smith v. Niagara F. Ins. Co., 60 Vt., 682, from which the company's counsel quotes at great length in its brief, involves only a question as to whether there had been a waiver by the company of proofs of loss required by the terms of the policy. The case is not, therefore, a precedent on the point to be determined here.

In *Cleaver v. Traders' Ins Co.*, 65 Mich., 527, cited by the company in support of its contention, the ground of forfeiture was not an existing insurance but a subsequent increase of insurance contrary to the policy stipulations, which it was claimed rendered the policy void, though at the date of its issuance it was admittedly a valid contract. On the second appeal from judgment in favor of the company, the case was reversed for the reason that the trial court refused to submit

the question of waiver to the jury (71 Mich., 414). That court has not in any case held against the rule contended for by the assured in the case at bar.

In *Steele v. German Ins. Co.*, [Mich.,] 53 N. W., 514, there was concurrent insurance of which the agent knew at the time the policy was written but no endorsement permitting such concurrent insurance was made upon the policy itself. In delivering the opinion for the court, Judge GRANT said:

It is the settled rule in these cases that the agents for the insurance companies, in making out these applications, do not represent the insured but the insurer and the consequences of their failure to incorporate the necessary statements in the application must fall upon the insurer and not upon the insured, who has made an honest statement of the facts; citing *Russell v. Ins. Co.*, 84 Mich., 161; 87 Mich., 428; *O'Brien v. Ins. Co.*, 52 Mich., 131.

In *Insurance Co. v. Earl*, 33 Mich., 143, that court held that a written instrument might be changed by parol, notwithstanding a declaration in the policy to the contrary, saying, "A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other and there can be no more force in an agreement by writing not to agree by parol than in a parol agreement not to agree in writing. Each agreement is ended by the new one which contradicts it."

In *Kyte v. Commercial Union Ins Co.*, 144 Mass., 43, as in the New York cases cited by company in its brief, the alleged forfeiture arose out of the conduct of the assured after issuance of the policy. The tenement had been insured as a dwelling. Afterwards it was put to a different use, that of a victualler and vender of intoxicating liquors. The pol-

icy having been valid when issued, and having previously passed from the agent's hands, the limitations upon the agent's authority were very properly enforced; but it is idle to cite the case as a controlling precedent on the facts presented by the record here.

The case of the *North Western National Ins. Co. v. Mize*, 34 S. W. 670 [Tex. Civ. App.], cited to sustain the contention of the company, bears no analogy to the case at bar and involves no principle which could control here. There was a continuing warranty that the insured should keep books of account and an inventory locked in a fireproof safe and, in case of loss, produce them or, in event of his failure to do so, that the policy should be void. The act working a forfeiture was the neglect of the assured and an act which could be performed by him at any time. That court, however, and the court of last resort of that state have both spoken, both before and since the opinion cited, to the precise point at issue in the case at bar and both have held in favor of the contention of the assured here.

In *Wagner v. Westchester Fire Ins. Co.*, 92 Tex., 549, decided in 1899, the opinion reviewed the authorities to some extent and quoted from the previous opinion by the same court in *Assurance v. Endee*, 65 Tex., 123, as follows:

To deliver a policy with full knowledge of the facts upon which its validity may be disputed, and then to insist upon these facts upon grounds of avoidance is to attempt a fraud. This the courts will neither aid nor presume, and when the alternative is to find this or find that in accordance with honesty and fair dealing there was an intention to waive the known ground of avoidance, they will choose the latter. Such issue is tantamount to the assertion that the policy was valid at the time of delivery and is a waiver of the known ground of invalidity.

Answering the objection that the policy in terms limited the agent's authority to act, except by writing, the court said:

It is claimed by the defendant in error that the policy itself prohibited any agent of the company to waive any of its conditions, except it be done in writing. To this proposition our supreme court has made a clear and distinct answer in the case of *Morrison v. Ins. Co.*, 69 Tex., 353, in which it is held that an agent, who has the power to make the contract of insurance, to issue the policy, and, in fact, exercise the highest authority which the law confers upon the corporation, stands in the place of the corporation itself, and that, having the authority to contract, he, no more than the corporation, can be bound to place his contract in writing, because it is a limitation upon the exercise of the authority conferred upon him. *Ins. Co. v. Lee*, 73 Tex., 646. It is not necessary for us to inquire whether these decisions were in accord with the weight of authority when they were made, for we are not inclined to overrule them and change a rule already established which, in the judgment of the court, is salutory and valuable in protecting the rights of those who deal with insurance companies.

In *German Ins. Co. v. Everett*, 18 Tex. Civ. App., 514, decided March 5, 1898, the court of civil appeals of that state held that an insurance company which delivered a policy with full knowledge of the facts upon which its validity may be disputed, cannot afterwards set up such facts as a ground for avoiding the policy. Among the other cases in that state holding to the same doctrine are the following: *Liverpool L. & G. Ins. Co. v. Endee*, 65 Tex., 118; *Morrison v. Ins. Co.*, 69 Tex., 353; *Planters Mutual Ins. Co. v. Lyons*, 38 Tex., 253. In that jurisdiction, as in all others to which the company has referred, the uniform holding is against it and in favor of the assured.

Insurance Co. v. Hebard, 95 Pa. St., 45, cited in the company's brief, involved the breach of a condition subsequent to the taking effect of the insurance contract, and did not involve in any way the principle sought to be applied in behalf of the insurer in the case at bar. On the precise question involved the supreme court of that state has held with the assured and against the insurer in many well considered cases. In its latest decision the doctrine of estoppel here invoked was extended so as to operate against the right of an insurer to claim forfeiture on account of a subsequent increase of insurance which was known to the company. The retention of the premium previously paid, with mere knowledge of the fact that an additional insurance had been written, was held to preclude the company from asserting a forfeiture on account of such additional insurance. (*Kalmutz v. Ins. Co.*, 186 Pa. St., 576.) In the opinion the following authorities are cited: Wood on Ins. (2d ed.), pp. 1162–1163; *Elliott v. Lycoming, etc., Ins. Co.*, 66 Pa., 26; *Wilson v. Ins. Co.*, 174 Pa., 557; *Eureka Ins. Co. v. Robinson*, 56 Pa. St., 256; *Ins. Co. v. Taylor*, 73 Pa., 342; *Light v. Ins. Co.*, 169 Pa., 316.

The supreme court of *Georgia* has recently reaffirmed the doctrine theretofore held in that state that, notwithstanding a policy stipulation requiring other insurance to be endorsed in writing, the contract was valid if the agent of the company, at the time of issuing the policy, knew of the prior insurance upon the property. (*Swain v. Ins. Co.*, 29 S. E., 147.)

The supreme court of *Wisconsin* applies the doctrine of estoppel or waiver to prevent a forfeiture on account of facts known to the company when issuing the policy. In a recent case that court applied the principle to a case where insured

goods were mortgaged and the existence of the mortgage was known to the agent when the policy was written. (*Hobkirk v. Phenix Ins. Co.*, 78 N. W., 160.)

The cases to the point in *Virginia* are referred to in the opinion in *Glover v. Ins. Co.*, decided in the circuit court of appeals for the fourth circuit. The rule in that state is in harmony with the contention of the assured in this case. That court, in a recent case, said:

Ward, knowing that he had truthfully represented to the agent of the company the existence of other insurance upon his property, had a right to assume that the agent had done his duty by communicating all necessary information to his principal, or that, whether communicated or not, the knowledge of the agent would be imputed to the company. Upon this point we are of the opinion that the insured, having at the time of his application for insurance communicated to the agent through whom the policy was obtained, all the facts material to the risk, the company is estopped to enforce the forfeiture, provided for by Article 5 of the policy, although its agent may have neglected to communicate his knowledge to the company and though the policy was issued in ignorance of the facts. (*Mutual Fire Ins. Co. v. Wood*, 28 S. E., 209.)

The courts of *Illinois* refuse to declare forfeitures in favor of insurance companies, based upon any fact known to the agent writing the policy when the same was issued. (*Ins. Co. v. Luttrell*, 89 Ill., 314; *Ins. Co. v. Steiger*, 26 Ill. App., 228; *Ins. Co. v. Swigert*, 11 Ill. App., 590; *Ins. Co. v. McDowell*, 50 Ill., 120.)

The *Minnesota* supreme court has held repeatedly that an insurance company by delivering a policy, knowing of the existence of concurrent insurance, waived the policy condition prohibiting such concurrent insurance except by in-

dorsement in writing on the policy. (*First National Bank v. Ins. Co.*, 58 Minn., 492; *Brandup v. Ins. Co.*, 27 Minn., 393.)

In *Insurance Company of North America v. Coombs*, 49 N. E., 471, the supreme court of *Indiana* held the rule contended for by the insured here. In the opinion of COMSTOCK, J., it was said:

The special verdict showed that the agent for the appellant company was also agent for the Ætna company and that he had possession of the policy for the purpose of doing whatever was necessary to entitle appellee to secure additional insurance; the knowledge of the agent of appellant company was, under the circumstances, knowledge of the appellant, and it must be held to have been taken with consent of appellant company. There is no finding that there was any fraud on the part of appellee in obtaining the insurance.

In *Collins v. Farmville Ins. & B. Co.*, 79 N. C., 279, the insurance was obtained from an agent who represented two companies and who wrote two policies, covering one stock of goods. The company at that time gave consent to concurrent insurance, but the other insurance was afterwards changed to another company by its own agent. The North Carolina court held the company liable, notwithstanding the failure to endorse upon the policy consent to the substitution. The court applied the equitable doctrine of estoppel against assertion of forfeiture under a policy condition based upon a fact known to the company when the policy was written. The same rule has since been applied in the case of *Grubbs v. North Carolina Home Ins. Co.*, 108 N. C., 472.

The supreme court of *South Carolina* in *Gaady v. Orient Ins. Co.*, 29 So., 655, in its opinion by JONES, J., said:

The question before us is whether the principal is estopped by conduct to assert a forfeiture, the assertion of which is inconsistent with the principal's conduct in accepting the premium and delivering the policy as a valid policy when, if the forfeiture was intended not to be waived, such policy would be void at its inception. On this question we do not see room for two opinions; the knowledge of the agent, acquired within the scope of his agency, is imputable to the principal. There is evidence tending to show that the agent had full power to solicit insurance, receive premiums, and write and countersign and deliver policies of insurance. There is nothing to suggest any limitation of the agent's powers in these regards. The receipt of the premium and the delivery of the policy were acts of the principal.

The South Carolina court has repeatedly held the same doctrine in other cases. (*Schroeder v. Springfield Fire Ins. Co.*, 51 S. C., 180; *McBride v. Ins. Co.*, 33 So., 729).

The *Nebraska* court has repeatedly held that where an insurance agent with authority to receive premiums and issue policies, exercises such authority with knowledge of the existence of concurrent insurance, the company is estopped to insist that the policy is void because consent to such concurrent insurance was not given in writing. (*Phenix Ins. Co. v. Covey*, 41 Neb., 724; *German-American Ins Co. v. Covey*, 41 Neb., 728; *Home Fire Ins. Co. v. Hammang*, 44 Neb., 566.

It is to be regretted that the adverse experience of counsel in the court of last resort of his own state has led to the undignified reference at page 6 of his brief to that court. We have abundantly shown justification, in respectable precedent, for the conclusion which that court has reached. Had counsel been conscious of the possible error in his own

judgment, as to the proper interpretation of an insurance contract, or even as to a proper conception of good business morals, as applied to the transaction involved in his cause, he might easily have refrained from the use of intemperate language in characterizing these courts which held against him as "courts like those of Nebraska, whose conception of an insurance policy is that it is a promissory note payable in case of fire." In this disparagement of the court of his own state, it is probable that counsel has erred and that his statement is an inaccuracy, of the same character as that made at page 17 of the same brief in referring to rulings of this court as "the decisions of this supreme tribunal of the world," by which, in his exuberent and fulsome praise, he has included some people and some territory in the jurisdiction of this court, over whom we may say, without any disparagement, this court exercises no authority.

We have not undertaken, in this review of the authorities, to refer to all the decisions to the point, nor yet to decisions in every state. Where omissions have been made, however, cross-references by the courts will be found in the opinions from which we have quoted. Our aim has been to go sufficiently into the question to demonstrate that there is a practical unanimity of opinion in favor of the application of the equitable doctrine of estoppel to transactions of the character disclosed between the insurer and the insured in the case at bar. The unanimity of opinion among text writers is no less striking. Below we quote from the four leading text writers on the subject of insurance.

AUTHORITY OF STANDARD TEXT WRITERS.

In 2 WOOD on Insurance (2 ed., pp. 908–910), the author, after an extended review of decisions, says:

It may be stated as a general rule that where the agent effecting insurance knows the situation and condition of the risk or its incidents or uses or the existence of conditions, uses or incidents that conflict with the conditions of the policy, and fails to provide therefor, his knowledge is the knowledge of the company, and the company cannot set up such matters in avoidance of the policy, and this applies to all matters such as incumbrances upon the property, or interest of the assured therein, the value of the property, the existence of other insurance, and every and any matters that it would have been the duty of the insurer himself to have provided for in the policy, if the matters known to the agent had been, in fact, known by him. The principle that an insurer, who contracts with full knowledge of the facts that constitute a breach of the conditions of the policy, is estopped from asserting them to defeat his liability thereon is predicated upon the rules of fair dealing, sound morality, and is in consonance with requirements of the most healthful public policy. It is the duty of the insurer under such circumstances to so frame the policy as to be operative in view of the circumstances existing in relation to the risk and known to him, and, failing to do so, the courts, acting upon the presumption that he intends to deal honestly, will treat him as having waived the conditions of the policy, so far as they operate to defeat liability, in view of the facts known to the insurer prior to the time when it was made. And in all cases the knowledge of the agent is to be imputed to the principal.

In 2 MAY on Insurance (4 ed., sec. 497, p. 1182), the author says:

To deliver a policy with full knowledge of the facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the

courts will neither aid nor presume; and when the alternative is to find this or to find that, in accordance with honesty and fair dealing, there was an intention to waive the known ground of avoidance, they will choose the latter. Such an issue is tantamount to an assertion that the policy is valid at the time of the delivery and is a waiver of the known ground of invalidity. So is the issue of a policy upon an application to a question in which no answer is given.

Mr. MAY in the same work, in section 499, citing the case of *Union Mutual Insurance Company v. Wilkinson*, 13 Wall., 222, says that the supreme court of the United States has at last thrown the great weight of its authority into the scale in favor of this doctrine of equitable estoppel.

In 1 JOYCE on Insurance, sec. 515, the author says:

As a general rule, notice to the agent and knowledge obtained by him while acting in the scope of his authority, is notice to the principal. So an insurance company is estopped from asserting the invalidity of its policy at the time it was issued for the violation of any of the conditions of such policy, if at the time it was so issued, the fact of such violation was known to the company or its duly authorized agent.

Judge OSTRANDER, in his work on Insurance, states the rule as follows:

When it is required by the terms of the policy that both prior and subsequent insurance must be disclosed to the company, and that, failing to do so, the insurer will not be liable for the loss, it has been generally held that where other insurance was existing at the time of the writing of the policy in suit, and was known to the agent of the company who wrote it, the insurer will be estopped from setting up such other insurance in a defense to a claim for loss, notwithstanding no notice and consent had been expressed in writing. This has been held with great uniformity, in disre-

gard of the stipulation in the policy that no agent of the company has authority to waive any of its conditions, except by distinct and specific agreement indorsed thereon. The courts appear to have based their decisions upon the equitable principle that the insurer, having accepted the premium with full knowledge of the other insurance, ought not to be permitted to escape performance of the obligation it has assumed, and for which it has received the consideration demanded. If there be two or more policies in different companies covering on the same property, written at one time and by the same agent, although on neither of the policies is indorsed permission for additional insurance, neither of the companies will be discharged because of the other insurance. Knowledge of the agent will be imputed to the company, and that which the insurer knew when engaging in the venture it will be presumed to have consented to. (Ostrander, Fire Ins., sec. 243, pp. 554, 555.)

We have taken liberty to use the above paragraph because the published work appears to be as authentic a source from which to ascertain Mr. Ostrander's views, as that to which counsel for petitioner directs the court at page 47 of his brief.

Since the decision in *Wilkinson's Case* (13 Wall., 222), it has been supposed that the great weight of the opinion of this court was thrown in favor of the application of the equitable doctrine of estoppel, in the practice of the common law courts to prevent unconscionable claims of forfeiture, when the grounds upon which the forfeitures were claimed were known to the insurer at the time the policies were issued. After the lapse of many years, and when the salutary rules announced in that case have at last been universally recognized and applied, the court is asked to re-write the law of insurance and to cut away the wholesome growth of the last sixty years; or at least to establish a rule for the guidance of the federal judges, at variance with the doctrines held by

the courts of almost every state. We fail to see in the suggestions made by the company's counsel, at page 6 of his brief, anything that should appeal to this court for a reversal of the judgment rendered below. Contrary to the suggestion of counsel, the fact is that perhaps not a state in the Union is without its own local insurance companies, which it fosters and encourages by appropriate legislation. The rule adopted by the inferior courts in this particular case is not a discrimination against foreign insurance companies, but is the rule adopted by the state court against the Home Fire Insurance Company of Omaha, a corporation organized under the laws of Nebraska, in a controversy to which both parties were residents of that state. In cases of this character the federal court obtains jurisdiction only on account of diverse citizenship. While this court may not feel bound to follow the decisions of a state court on a matter of commercial or general law, yet it, nevertheless, would be unfortunate if, by holding to a different doctrine, foreign companies doing business in this jurisdiction should become favored suitors and escape burdens which, under the rulings of the state court, are imposed upon domestic corporations engaged in the same identical line of business. The foregoing review of authorities indicates that such would be the effect of the reversal of the judgment of the circuit court of appeals in this case, not only as to the relative rights of domestic and foreign companies in Nebraska, but that it would affect similarly their relations in almost every state in the Union. While we hold that the doctrine maintained by the state courts is intrinsically correct and is salutary in securing good business methods, we still think that on a question involving no federal rights or laws, and in which jurisdiction is acquired solely on the ground of diverse citizenship, even this court

might be constrained to yield on a point of commercial law to the concurrent views of the courts of practically all the states.

The justice of the rule held in the circuit court of appeals is so manifest, and the courts of the country, state and federal, have so universally applied it in similar cases, that it should not now be overturned in this court.

III.

The facts found are sufficient to sustain the judgment.

In view of the fact that the case comes here, after right to prosecute error or appeal is exhausted, by writ of certiorari from this court, to settle a question of law in the interest of uniformity of decision, it would seem to be asking very much to insist upon this court examining into the sufficiency of the findings as to form, or of the evidence on which the findings rest. These points, however, have been made by counsel for the insurance company, although not involved in the question of law on which the circuit courts of appeals have divided.

It is contended now that the facts in issue upon the questions of waiver and estoppel are not found. The jury found that the subsisting, concurrent insurance of $1,500 in the Firemen's Fund Insurance Company had, on behalf of the insured, been reported to the agent who wrote the policy, and was known to such agent when he issued and delivered the policy sued on. These are the ultimate facts out of which the waiver or estoppel pleaded arises. It is true plaintiff's pleadings alleged also the legal inference or conclusions from these facts, that in law they constituted a

waiver of the policy condition against other insurance, and estopped the company to claim a forfeiture on that ground. The answer denied these averments, and alleged that plaintiff, in violation of the policy stipulation, "and without the knowledge of defendant," procured the issuance of the further policy of $1,500. The facts in issue were whether the additional policy was existing when the policy in suit was issued, and whether its existence was known to the agent of the company when he issued the policy sued on. The verdict responds directly and unequivocally to these issues, and sets forth the ultimate facts necessary to determine the applicability of the law of waiver and estoppel to the case. The facts are, therefore, sufficiently stated on the record to refer to the court the consideration of the question of law. This fulfills the requirements of a special verdict. The legal inference or conclusion as to whether these facts operated as a waiver or estoppel was for the court to determine. That was purely a question of law, which was contested; and in order to afford the court time for deliberate investigation, he expressly reserved it at the trial by this procedure.

We have no contention to make as to correctness of the general doctrines enunciated in the cases referred to by plaintiff in error under this point. We admit the verdict should respond to the issues; and that the question for review upon a special verdict is whether the facts found are sufficient to support the judgment. But, measured by these tests, the verdict is good. Imagine the court throwing upon the jury the responsibility of determining the law of the case by answering directly the question, "Is the defendant estopped to claim a forfeiture?" The answer to such a *quære* would be of no validity, unless the ultimate facts in issue, on which it was based, were also found. If the facts pre-

cluded such an inference, in law, then the facts would control, and the erroneous inference drawn would be treated as surplusage by the court.

In *Moukhouse v. Hay*, 8 Price, 256, decided as early as 1826 in the exchequer chamber of England, the test of a special verdict was held to be wheather sufficient facts are stated on the record to refer to the court the consideration of the question of law.

In *Conner v. Citizens St. Ry.*, 105 Ind., 62, it was specifically ruled that it is not the province of the jury, in returning a special verdict, to draw inferences or conclusions from the facts found. When the jury find and return a special verdict, it must then be considered that the facts in the case are no longer in dispute. And the special verdict is good if it state facts sufficient on the record to refer to the court the consideration of the question of law.

There is no merit in the suggestion that a letter written by a foreign agent of the company, after loss, and after receipt of proofs, conclusively negatives any inference of waiver or estoppel. If that were the rule, defenses of this character would be readily relieved of all embarrassment. In fact, the letter, quoted at page 50 of petitioner's brief, was admissible in evidence only as an admission against the company's interest. A rule enforced in many jurisdictions is that when the company, after claim is made, puts its objection to paying the loss on a certain specific ground, it is, when suit is afterwards brought, limited to that defense. Plaintiff in his petition averred that the company had denied liability on the sole ground that its policy had never taken effect, owing to the other $1,500 policy; and at trial, to avoid necessity of showing in detail compliance with many policy conditions, introduced this letter, which was received with-

out objection. That, in counsel's opinion, it is a good letter, may justify him in thus pressing it upon the attention of the court; but no point is made on it, and it is not assigned for error that the evidence is insufficient to support the findings. The judgment should be affirmed.

Respectfully submitted,

HALLECK F. ROSE,
Attorney for Defendant.

LINCOLN, NEBRASKA, March 12, 1901.

Joseph R. Webster,
Of Counsel.

Supreme Court of the United States.

No. 60.—October Term, 1901.

The Northern Assurance Company of London, Petitioner, *vs.* The Grand View Building Association.	On writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 6, 1902.]

In September, 1898, the Grand View Building Association, a corporation organized under the laws of Nebraska, in the district court of Lancaster County of that State, brought an action against the Northern Assurance Company of London, incorporated under the laws of the Kingdom of Great Britain and Ireland, seeking to recover the sum of $2,500 as due under the terms of a policy of insurance that had been issued by the assurance company to the plaintiff company on December 31, 1896, on certain property situated in said Lancaster County, and which, on June 1, 1898, had been destroyed by fire.

Thereupon the defendant company filed in the said county court a petition and bond, in due form, and prayed for an order removing the cause to the Circuit Court of the United States for the District of Nebraska; and on September 29, 1898, the county court approved the bond, and entered an order granting the prayer of the petition for removal.

Subsequently the case was put at issue on the petition, answer and reply in the Circuit Court of the United States, and was so proceeded in that, on October 20, 1898, a special verdict was found by the jury empaneled in the case, and on January 14, 1899, a final judgment was entered for the plaintiff and against the defendant company in the sum of $2,500, with interest and costs. The cause was then taken to the United States Circuit Court of Appeals for the Eighth Circuit, and that court, on March 26, 1900, affirmed the judgment of the Circuit Court. (101 Fed. Rep. 27.) Thereafter, on petition of the defendant company, a writ of certiorari was allowed, in response to which the record and proceedings in the cause were brought to this court.

Mr. Justice Shiras delivered the opinion of the Court.

In order that the questions discussed in this case and the grounds of our judgment therein may sufficiently appear, it seems proper to set out, with substantial fulness, the pleadings of the parties and the special verdict of the jury.

The plaintiff's petition, having alleged the making of the policy of insurance and the destruction of the property insured, then proceeded to allege in its fourth paragraph, apparently by way of meeting an expected defense, that "plaintiff, shortly prior to issuance of aforesaid policy by the defendant, had procured a policy of insurance from the Firemen's Fund Insurance Company, incorporated under the laws of California, insuring it against loss by fire of the same property in the sum of $1,500 for a term of two years, which insurance was then subsisting and remained in force to and including the date of said fire; that the fact of said subsisting insurance in said company was, by H. J. Walsh, plaintiff's president, disclosed to defendant at and prior to the execution and delivery of said policy, and prior to payment by plaintiff of said premium therefor, and was so by him orally disclosed and communicated to defendant's recording agent at Lincoln, Nebraska, A. D. Borgelt, who then had full authority from defendant to countersign and issue its policies and accept fire insurance risks in its behalf and accept and receive the premium therefor, and who in fact accepted said risk and issued said policy, and accepted and received said premium as such agent in behalf of defendant with knowledge beforehand of said concurrent insurance, and with the intent knowingly to waive the condition of said policy that 'it shall be void if the insured now has or shall hereafter make or procure any other contract of insurance' on the property covered thereby. And by the aforesaid several acts and by procuring, receiving, accepting and retaining of said insurance premium with knowledge of said subsisting concurrent insurance the defendant has waived the said condition and is estopped to claim benefit thereof, and is bound by its said policy notwithstanding said condition; that plaintiff had no insurance on said property except as before stated."

Having stated that plaintiff had rendered and delivered a statement of loss, in compliance with the terms of the policy, the petition further alleged that "on the 26th day of July, 1898, the plaintiff demanded of defendant the payment of said insurance; and defendant, disregarding its undertaking in that behalf, denies liability on the sole ground that said policy has been void from the date of its issue by reason of the said provision in regard to other insurance, the same provision which as aforesaid it had waived at the time of issuing its said policy."

The answer of defendant admitted the making of the policy, the destruction of the insured property by fire, and proof of loss, but denied specifically the allegations of the fourth paragraph of said petition, as as follows:

"Further answering, this defendant alleges that the policy of insurance which it issued to the plaintiff on December 31, 1896, contained the following provision:

"'This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall here-

after make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy.' The defendant further says that its policy in question was issued to the plaintiff with the express statement therein made that it was issued in consideration of the 'stipulations' therein named and a certain amount of premium paid therefor. And said policy, besides the provisions above quoted, contains the following stipulation and condition: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed herein or added thereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or or be claimed by the insured unless so written or attached.' The defendant says that notwithstanding the stipulations, provisions and agreements above set forth and without the consent of the defendant endorsed upon said policy in writing, and without the knowledge of the defendant, the plaintiff obtained a policy of insurance, upon the property covered by the policy issued by this defendant, in the sum of $1,500 in the Firemen's Fund Insurance Company.

"Defendant says that the property upon which it issued its policy in the sum of $2,500 was represented by the plaintiff to the defendant to be of the value of $3,500. The defendant alleges that by reason of the additional insurance upon said property, not consented to in writing endorsed upon the policy of defendant, and not in fact known to the defendant, the policy written by the defendant upon the plaintiff's property was, at the date of the fire which damaged or destroyed the plaintiff's property wholly void, and was and has been void from the date of such additional assurance. Defendant further says that on the 5th day of August, 1898, the defendant tendered to the plaintiff in current fund the sum of $33.75, the amount of the premium paid by the plaintiff upon the policy in question, and now brings into court and tenders to the plaintiff the said sum of $33.75, with interest at the rate of seven per cent from December 31, 1896."

The plaintiff company replied to the answer, denying that it procured a policy of insurance in the Firemen's Fund Insurance Company upon the property insured by defendant in violation of the terms of the policy issued by defendant and without the knowledge of defendant, and made the following allegations:

"The policy referred to in said answer of $1,500 in the Firemen's Fund Insurance Company was, on the contrary, subsisting at and prior to the issuance by defendant to the plaintiff of the policy sued on herein, and was in fact issued December 12, 1895, for the term of three years, and the existence of such policy was personally well known to A. D. Borgelt, defendant's recording agent, who wrote said policy, and accepted said risk, and who then had full charge of defendant's agency at Lincoln,

Nebraska, with authority to accept fire insurance risks for and on defendant's behalf, to countersign and issue its policies of insurance, and to collect and receive the premiums therefor. And at and prior to his acceptance of said risk and insurance of the policy sued on, the plaintiff's president, H. J. Walsh, reported orally to said A. D. Borgelt the fact of such subsisting insurance of $1,500, and said Borgelt, as such agent, with full knowledge of said fact, accepted the risk, and wrote, executed and delivered said policy to defendant, with the intent on the part of both plaintiff and defendant that the same should be concurrent with the said subsisting insurance and not avoided or affected thereby, and with purpose and intent of defendant knowingly to waive and forego all benefit of the provisions of said policy set forth in defendant's answer; and in faith thereof and with the sole purpose to procure such insurance to be concurrent with the subsisting insurance, and not otherwise, the plaintiff paid, and the defendant procured and received, the premium therefor. By all the aforesaid several acts the defendant has waived all benefit of the particular conditions of its policy prohibiting concurrent insurance, prior and subsequent, except by endorsement on the policy; and the defendant is estopped and concluded thereby from claiming any benefit or advantage by reason of said conditions of the policy."

In support of its side of the issues thus presented, the plaintiff company called as witnesses H. J. Walsh, its president, and Bert Richards, the agent of the Firemen's Fund Insurance Company, who testified that Borgelt was informed by them and had knowledge of the subsisting insurance at and before the delivery of the policy in suit. The plaintiff likewise put in evidence the original policy sued on, and a letter from G. H. Lermit, manager of the defendant company at Chicago, Illinois, and who had signed the policy in suit as such agent, in the terms following:

"CHICAGO, *Aug.* 2, 1898.

"To Grand View Building Association, H. J. Walsh, President, Lincoln, Nebraska.

"DEAR SIRS: We have your favor of the 26th ult. enclosing to us what purports to be proof of loss, making claim under our policy No. 310,024, of Lincoln, Nebraska, agency, and issued to you for $2,500 on household furniture, &c., while contained in the three-story brick and stone building on lot F in Grand View Residence Park addition, on account of a fire which occurred on the 1st day of June, 1898, and beg to say in reply that your sworn statement therein, advises us that you had other insurance on this same property to the amount of $1,500. This additional insurance held by you was without the knowledge or consent of this company, and was not permitted by agreement as provided for in lines Nos. 11, 12 and 13 of the printed conditions of our policy, to which we beg to refer you. We, therefore, regret to have to advise you and do hereby say to you that the Northern Assurance Company specifically and absolutely denies any and all liability under said policy No. 310,024 held by you, holding that said policy has been void from the date of its issuance by reason of the said provision in regard to other insurance above referred to.

"Our agents at Lincoln have been instructed to return to you the full premium paid them by you, namely, $33.75, at once."

The plaintiff further offered the original policy in evidence, containing, among other things, the following provisions:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements and conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or remission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

The defendant, to maintain the issues on its part, called as a witness A. D. Borgelt, who testified that he was a member of the firm of Borgelt & Beasley, insurance agents at Lincoln, Nebraska, which firm wrote the policy in the Northern Assurance Company on the Grand View Building Association; that at the time he wrote the policy he had no notice or knowledge that there was other insurance upon the property covered by the policy in suit, and the first time he knew of any other insurance was after the fire; that while Walsh might have mentioned that there was an existing policy, he, the witness, had no recollection of having known anything about the other insurance until after the fire. He further testified that on August 4, 1898, the premium paid for the policy in suit was tendered to the plaintiff company, which declined to take it. The defendant thereupon moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled, and defendant excepted.

The jury, under the instructions of the court, found that the defendant company issued to the plaintiff company the policy described in the plaintiff's petition; that the property covered by said policy of insurance was burned on or about June 1, 1898; that the plaintiff, on or about July 26, 1898, furnished the defendant with proofs of the loss of said property by fire; that the policy contained the provision hereinbefore mentioned, providing that the policy should be void if the insured had or should thereafter make or procure any other contract of insurance on the property covered by the policy in suit, and that the policy was made subject to such condition, and that no officer, agent or other representative of the company should have power to waive any provision or condition of the policy except such as by the terms of the policy had been endorsed thereon or added thereto, and that no officer, agent or representative of the company should have power or be deemed or held to have waived such pro-

vision or condition unless such waiver was written upon or attached to the policy, and that no privilege or provision affecting the insurance under the policy should exist or be claimed by the insured, unless so written or attached; that there was at the time of the issuance of the policy in suit other insurance upon the insured property in the sum of $1,500, in the Firemen's Fund Insurance Company; that Borgelt was recording agent of the Northern Assurance Company, at Lincoln, Nebraska, with authority from the defendant company to countersign and issue its policies and accept fire insurance risks in its behalf, and to collect and receive premiums therefor, and that he had issued the policy sued on as such agent; that Borgelt knew, when the policy in the defendant company was issued and delivered to the plaintiff company, that there was then $1,500 subsisting insurance in the Firemen's Fund Insurance Company upon the insured property, issued prior to the date of the policy of the defendant company, and that such knowledge was communicated to said Borgelt by and on behalf of the assured; that the actual cash value of the property covered by the policy in suit and destroyed by fire June 1, 1898, was $4,140; that no consent to concurrent insurance of $1,500 was endorsed on the policy in suit; and that, on August 4, 1898, the amount of the premium paid for the policy was tendered to and refused by the plaintiff.

Thereafter motions were respectively made by the plaintiff and defendant for judgment upon the findings and special verdict of the jury, and on January 14, 1899, the motion of the defendant was overruled, and exception was taken by the defendant, and the motion of the plaintiff was sustained, and judgment was entered in favor of the plaintiff and exception was taken by the defendant. A writ of error was prayed for by the defendant and allowed, and the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the judgment of the Circuit Court was affirmed, and the cause was then brought to this court by a writ of certiorari.

Over insurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable.

In the present case, such a provision was expressly and in unambiguous terms contained in the policy sued on, and it was shown in the proofs of loss furnished by the insured, and it was found by the jury, that there was a policy in another company outstanding when the present one was issued.

It also was made to appear that no consent to such other insurance was ever endorsed on the policy or added thereto.

Accordingly it is a necessary conclusion that by reason of the breach of the condition the policy became void and of no effect, and no recovery could be had thereon by the insured unless the company waived the condition. The question before us is therefore reduced to one of waiver. The policy itself provides the method whereby such a waiver should be made: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any provision or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Before proceeding to a direct consideration of the question before us, it may be well to inquire into the principles established by the authorities as applicable to such cases.

It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. This rule is thus expressed in Greenleaf on Evidence, vol. 1, sec. 275, 12th ed.:

"When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected."

The rule is thus expressed by Starkie, 587, 9th Am. ed.:

"It is likewise a general and most inflexible rule, that wherever written instruments are appointed, either by the requirement of law, or by the compact of the parties, to be the repositories and memorials of truth, any other evidence is excluded from being used, either as a substitute for such instruments or to contradict or alter them. This is a matter both of principle and policy; of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence; of *policy*, because it would be attended with great mischief if those instruments upon which men's rights depended were liable to be impeached by loose collateral evidence."

This rule has always been followed and applied by the English courts in the case of policies of insurance in writing.

Thus in *Weston* v. *Eames*, (1 Taunt. 115,) it was held that parol evidence of what passed at the time of effecting a policy is not admissible to restrain the effect of the policy, Mansfield, C. J., observing that "such evidence could not be admitted, without abandoning in the case of policies, the rule of evidence which prevails in all other cases; and that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected."

In *Robertson* v. *French*, (4 East, 130,) it was held, per Lord Ellenborough, in a suit on a marine policy of insurance, that a parol agreement that the risk should begin at a place different from that inserted in the policy, cannot be received in evidence.

These cases are cited as establishing the rule in cases of insurance in Marshall on Marine Insurance, 278, and in Arnold on Insurance, vol. 1, p. 277.

In *Flinn* v. *Tobin*, (1 Mood. & Malle. 367,) Lord Tenderden, C. J., said that "the contract between the parties is the policy which is in writing, and cannot be varied by parol. No defense, therefore, which turns on showing that the contract was different from that contained in the policy, can be admitted; and this is the effect of any defense turning on the mere fact of misrepresentation without fraud."

So, where, in assumpsit for use and occupation, upon a written memorandum of lease, at a certain rent, parol evidence was offered by the plaintiff of an agreement at the same time to pay a further sum, being the ground rent of the premises, to the ground landlord, it was rejected. (*Preston* v. *Merceau*, 2 W. Bl. 1249.)

And where, in a written contract of sale of a ship, the ship was particularly described, it were held that parol evidence of a further descriptive representation, made prior to the time of sale, was not admissible to charge the vendor without proof of actual fraud; all previous conversations being merged in the written contract. (*Pickering* v. *Dowson*, 4 Taunt. 779.) See, also, *Powell* v. *Edmunds*, (12 East, 6;) *Smith* v. *Jeffreys*, (15 M. & W. 561;) *Gale* v. *Lewis*, (9 Q. B. 730;) *Executors* v. *Ins. Co.*, (7 M. & W. 151.)

The case of *Western Assurance Co.* v. *Doul et al.*, (12 Canada S. Ct. 446,) was one where a policy of insurance against loss by fire contained the following condition: "In case of subsequent insurance, notice thereof must be given in writing at once, and such subsequent insurance endorsed on the policy granted by this company, or otherwise acknowledged in writing; in default whereof such policy shall forthwith cease and be of no effect."

The insured effected subsequent insurance and verbally notified the agent, but there was no endorsement made on the policy, nor any acknowledgment in writing by the company. A loss having occurred, the damage was adjusted by the inspector of the company, and neither he nor the agent made any objection to the loss on the ground of non-compliance with the above condition. In a suit to recover the amount of the policy the company pleaded breach of the condition, in reply to which the plaintiff set up a waiver of the condition and contended that by the act of the agent and inspector the company was estopped from setting it up. It was *held* by the Supreme Court of Canada that the insured not having complied with the condition, the policy ceased and became of no effect on the subsequent insurance being effected, and that neither the agent nor the inspector had power to waive a compliance with its terms.

In discussing the question of the power of the agent to waive the condition, the court said: "It is not shown that it was within the scope of Greer's authority as a local agent to waive such a condition. The condition itself does not, either by express words or by implication, recognize such an authority, but the reason for requiring the notice obviously points to a directly contrary construction. Moreover, the English case already quoted, (*Gale* v. *Lewis*, 9 Q. B. 730,) which determines that the required notice is to be given to the company itself and not to the local agent, shows, *a fortiori*, that such an agent has, in the absence of express authority, no power to waive the condition. Direct authority is, however, not wanting. In the case of *Shannon* v. *Gore Mutual Insurance Company*, (2 Ont. App. 396,) the facts were the same as in the present case, the subsequent assurance having been effected through the agent who also acted for the defendant in taking the original risk. It was contended that the successive insurances having been thus effected with the same person as the agent of the two companies, the company which granted the first policy had knowledge of the subsequent insurance, and were therefore estopped from setting up a condition vitiating the policy for want of a written notice. But the Court of Appeal held otherwise, and determined that 'in such a case notice to the agent was not notice to the company, and that the agent neither had authority to waive the condition nor could by his conduct estop his principals the first insurers.' As regards any direct action of the insurance company through their immediate agents, the directors or principal officers of the company conducting its affairs at the head office, there is no pretence for saying that there is in the present case the slightest evidence of conduct upon which either a defense of waiver of the condition, or by way of estoppel against insisting upon it, can be based, and this for the very plain reason that these directors and officers never had the fact of a subsequent assurance brought to their knowledge, and without proof of such knowledge neither waiver nor

estoppel can be made out. The condition in the policy is one which must be complied with or waived. The company, by signing a condition of that kind, reserves to itself the right to withdraw the policy in case of further insurance. That question is one which cannot be decided by a mere local agent. He may receive the notice for transmission, but he cannot act on it; it must be brought to the notice of some person authorized by the company to continue the insurance after notice has been given them. It has been decided in a number of cases in England that a local agent has not such authority, and a mere notice to him, even in a case where he is acting for another company taking the further risk, has been held to be no notice to the company."

Coming to the decisions of our State courts, we find that, while there is some contrariety of decisions, the decided weight of authority is to the effect that a policy of insurance in writing cannot be changed or altered by parol evidence of what was said prior or at the time the insurance was effected; that a condition contained in the policy cannot be waived by an agent, unless he has express authority so to do; and then only in the mode prescribed in the policy; and that mere knowledge by the agent of an existing policy of insurance will not affect the company unless it is affirmatively shown that such knowledge was communicated to the company.

In *Worcester Bank* v. *Hartford Fire Insurance Company*, (11 Cush. 265,) which was a case of additional insurance, and where one Smith testified that he was agent for the defendant company to issue policies, and was in the habit of receiving notices of additional insurance, which he endorsed on the policies, it was held by the Supreme Judicial Court of Massachusetts that as it is provided in the policy on which this action is brought that if the assured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this company, and have same endorsed on this instrument or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect, and as, after the making of this policy, the assured obtained other insurance on the same property, but did not not have the same endorsed on the policy or otherwise acknowledged by the defendants in writing, the policy was void, notwithstanding there was parol evidence tending to show that notice had been given to Smith, the company's agent.

The same court held, in *Hale* v. *Mechanics' Mutual Fire Insurance Company*, (6 Gray, 169,) that a policy issued by a mutual fire insurance company, whose by-laws provided that any insurance subsequently obtained without the consent in writing of their president should avoid the policy, and that the by-laws should in no case be altered except by a vote

of two-thirds of the stockholders or directors, was avoided by a subsequent insurance obtained with the mere verbal consent of the president. It was said by Bigelow, J., giving the unanimous opinion of the court:

"Such being the rights of the parties under the contract, it is clear, upon the facts in this case, that the policy was annulled under the fifteenth article of the by-laws, by reason of the subsequent insurance procured by Stone and Pony on the property, without the assent of the president of the corporation in writing; unless the waiver of such written assent by the president, and his verbal assent to such subsequent insurance as found by the jury, operate to set aside this provision in the by-laws as to this particular policy and render the contract valid, notwithstanding by its express terms, as by the clause in the by-laws, it would be otherwise void. But the difficulty in maintaining the plaintiff's position on this part of the case is, not only that it attempts to substitute for the written agreement of the parties a verbal contract, but that there is an entire absence of any authority on the part of the president to make such waiver or give such verbal assent. He was an agent, with powers strictly defined and limited, and could not act so as to bind the defendant beyond the scope of his authority. (Story on Agency, secs. 127, 133; *Salem Bank* v. *Gloucester Bank*, 15 Mass. 29.) By article 15 of the by-laws, his power to assent to subsequent insurance was expressly confined to giving such assent in writing. In order to guard against the danger of over insurance, the corporation might well require that any assent to further insurance on property insured by them should be given by the deliberate and well-considered act of their president in writing, and not be left to the vagueness and uncertainty of parol proof. The whole extent and limit of the president's authority in this respect were set forth in the by-laws attached to the policy in the present case, and, as the evidence shows, were fully known to the assured. . . . If the argument of the plaintiff should be carried out to its legitimate result, it would give to the president the right, in any case, to suspend or change the by-laws by his verbal act and at his pleasure. This clearly he had no power to do. We are therefore of opinion that the finding of the jury does not render the policy valid; but that it was annulled by the subsequent insurance obtained by the assured without the written consent of the president."

In *Smith* v. *Niagara Fire Ins. Co.*, (60 Vt. 682,) the Supreme Court of Vermont, in an elaborate opinion; in *Wilson* v. *Ins. Co.*, (4 R. I. 141,) the Supreme Court of Rhode Island, and in *Cleaver* v. *Traders' Ins. Co.*, (65 Mich. 527,) and same case in 71 Michigan, 414, the Supreme Court of Michigan; *held*, that the fact that the company's agent had authority, in a certain way or manner, to consent to the taking of additional insurance, does not aid the plaintiff; that the agent did not consent, in the cases cited, within the line of his authority or in the manner prescribed by the policy, wherein the agent is expressly prohibited from waiving or modifying the written contract.

The same view of the law prevails in Connecticut. In *Sheldon* v. *Hartford Fire Insurance Company*, (22 Conn. 235,) it was held that where the policy and survey constituted a contract between the parties, and there

was no imperfection or ambiguity in the contract, evidence of parol representations made to the agent prior to the issuing of the policy could not be received to explain or qualify the contract. See, also, *Glendale Man. Co.* v. *Protection Ins. Co.*, (21 Conn. 19, 37 ;) *Hough* v. *City Fire Ins. Co.*, (29 Conn. 10.)

New York Insurance Co. v. *Thomas*, (3 Johns Cases, 1,) was an action upon a policy of insurance, and where parol evidence was offered to vary the terms of the instrument. The question was thus disposed of by Kent, J. :

"The next point is whether the parol proof be admissible to explain the contract, and, if it be, what is the effect, in the present case, of such proof.

"I know no rule better established than that parol evidence shall not be admitted to disannul or substantially vary or extend a written agreement. The admission of such testimony would be mischievous and inconvenient. Parol evidence is to be received in the case of an *ambiguitas latens*, to ascertain the identity of a person or thing, but before the parol evidence is to be received in such case, the latent ambiguity must be made out and shown to the court. In the present instance there is no ambiguity. The language of the contract, throughout, is consistent and explicit. This general rule of law has been particularly and emphatically applied to policies. (Skinn. 54.) And except in the special instance of explanations resulting from the usage of trade, they have never been allowed to be contradicted by parol agreements."

Jennings v. *Chenango Mut. Ins. Co.*, (2 Denio, 75,) has long been a leading case. There it was held that conditions of insurance containing statements of the purpose for which the property insured is to be occupied, and of its situation as to other buildings, are warranties, and if untrue the policy is void, though the variance be not material to the risk; and that parol evidence that the insured truly informed the agent of the insurer who prepared the application as to these particulars is not admissible. In the opinion, the language of Parker, C. J., in *Higginson* v. *Dall*, (13 Mass. 96,) is quoted, that "policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature and subject to most of the rules of evidence which govern in the case of specialties. The policy is itself considered to be the contract between the parties, and whatever proposals are made or conversations had prior to the subscription, they are considered as waived, if not inserted in the policy, or contained in a memorandum annexed to it."

In *Fowler* v. *Metropolitan Ins. Co.*, (116 N. Y. 389,) it was said:

"A long line of authorities has settled the law to be that when it is expressly provided that the premium on a life insurance policy shall be paid on or before a certain day, and in default thereof the policy shall be void, that the non-payment of the premium upon the day named works a forfeiture. . . . The claim that such a provision, in a paid-up policy,

is unconscionable and oppressive, and presents a case in which a court of equity should relieve from the forfeiture incurred by omission to make prompt payment of premiums, is not a new one. It has frequently been presented to the courts and has recently received very full consideration in this court in *Attorney General* v. *North American Life Insurance Co.*, (82 N. Y. 172,) and in *People* v. *Knickerbocker Life Ins. Co.*, it was decided in those cases that provisions in paid-up policies, issued in lieu of other policies on which notes had been given for premiums, that they should be void in case the interest on such notes was not paid, are not unconscionable, oppressive or usurious. In the first case cited, Judge Earl said: 'There are doubtless some decided cases which hold that such forfeiture should not be enforced, but I think the better rule is to uphold and enforce such contracts when free from fraud or mistake, just as the parties have made them.' And in *Douglass* v. *Knickerbocker L. Ins. Co.*, (83 N. Y. 492,) it was said: 'It has generally been found most conducive to the general welfare to leave parties to make their own contracts, and then enforce them as made, unless, on the ground of fraud, accident or mistake, ignorance, impossibility or necessity, relief can be granted against them.' . . . It would be impossible to sustain the claim that the statements and representations contained in the pamphlet issued by the company were to be regarded as affecting or modifying the strict terms of the policy without disregarding the established rule of law that a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and that the whole engagement of the parties and the extent and manner of their undertaking are embraced in the writing. This rule is the same in equity as at common law, and although a written agreement may be set aside or reformed, fraud or mistake must be shown to entitle a party to such relief. And it is never competent in an action upon a written contract to show that it was executed on the faith of a preceding parol stipulation not embraced in it."

In *Baumgartel* v. *The Providence Washington Ins. Co.*, (136 N. Y. 547,) where defendant had issued to plaintiff a policy of fire insurance which contained a clause to the effect that, unless otherwise provided by agreement endorsed thereon, it should be void in caseof other insurance on the property insured; and it also provided that no agent of the company should have power to waive any provision or condition of the policy except such as by its terms might be the subject of agreement endorsed thereon or added thereto, and, as to those, that he should have no such power nor be deemed to have waived them unless in writing so endorsed or attached; and where, in an action upon the policy, it appeared that, during its life, the plaintiff without notice to the defendant and without its knowledge or consent, obtained other insurance upon the property, and that thereafter he informed the agent, who had issued the policy, of this fact, and that the agent had replied, "All right; I will attend to it;" but it did not appear that the plaintiff then had the policy in suit with him or afterwards applied to said agent for written consent to the other insurance; it was *held* that knowledge of the agent of the subsequent insurance did not satisfy the condition of the policy, and that plaintiff

having failed to comply therewith, the policy was forfeited and void; and also *held* that the statements of defendant's agent did not amount to a waiver of the conditions or authorize the application of the doctrine of estoppel. It was said in the opinion:

"The stipulation with respect to further insurance is one of the conditions upon which, by the agreement of the parties, the liability of the defendant depended in the case of a loss during the term of the insurance. The parties have also agreed upon the mode in which the condition could be complied with or waived, namely, by writing endorsed upon the policy in the form of a consent to the other insurance. The agent had power to give this consent only in the manner prescribed by the contract. But there is not in the case any proof, even of verbal consent by the agent, that the plaintiff might procure further and additional insurance. . . . 'The effect of such stipulations in a contract of insurance as well as the manner in which they may be modified or waived by agents of the company have been so thoroughly discussed and so clearly pointed out, that a reference to some of the more recent cases on the subject is all that is needful here. (*Allen* v. *German Ins. Co.*, 123 N. Y. 6; *Quinlan* v. *Providence W. Ins. Co.*, 133 Id. 356; *Messelback* v. *Norman*, 122 Id. 583; *Welsh* v. *Hartford Ins. Co.*, 73 Id. 5.)'"

It is doubtless true that in several later cases the New York Court of Appeals seems to have departed from the principles of the previous cases, and to have held that the restrictions inserted in the contract upon the power of an agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract when it appears that the agent has delivered it and received the premiums *with full knowledge of the actual situation.* To take the benefit of a contract *with full knowledge of all the facts* and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party. (*Robbins* v. *Springfield Fire Ins. Co.*, 149 N. Y. 484; *Wood* v. *American Fire Ins. Co.*, 149 N. Y. 385.) (But see *Rohrback* v. *German Fire Ins. Co.*, 62 N. Y. 63, and *Owens* v. *Holland Ins. Co.*, which are irreconcilable.)

The fallacy of this view is disclosed in the phrases we have italicized. It was thereby assumed that the agent had full knowledge of all the facts, that such knowledge must be deemed to have been disclosed by the agent to his principal, and that, consequently, it would operate as a fraud upon the assured to plead a breach of the conditions. This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence, and the express provision that no waiver shall be made by the agent except in writing endorsed on the policy. As we shall hereafter show when we come to consider the meaning and legal purport of the contract in suit, such express provision was intended to protect both parties from the dangers involved in disregard-

ing the rule of evidence. The mischief is the same whether the condition turned upon facts existing at and before the time when the contract was made, or upon facts subsequently taking place.

In *Franklin Fire Ins. Co.* v. *Martin*, (41 New Jersey Law Reports, 568,) the facts were as follows: A policy described the property insured as "occupied as a dwelling and boarding house;" in fact, it was occupied as a country tavern, and there was kept for use a billiard table in a room back of the bar room. The property continued to be so used until the fire occurred. In the conditions of insurance, taverns were classified as extra hazardous, and billiard rooms were named as specially hazardous, each being subject to higher premiums than ordinarily hazardous rights. It was *held* by the New Jersey Court of Errors and Appeals that evidence that the application for insurance was prepared by the agent of the insurer, and that he knew, at the time of the application, that the property was occupied as a tavern, and that a billiard table was kept in it for use, could not be received for the purpose of showing that, under the description of a dwelling and boarding house, the parties intended to insure the premises as they were then, in fact, being used; that a written contract of insurance cannot be altered or varied by parol evidence of what occurred between the insured and the agent of the insurer at the time of effecting the insurance; and that such evidence will not be received to raise an estoppel *in pais*, which shall conclude the insurer from setting up the defense that the policy was forfeited by a breach of the conditions of insurance.

In the opinion of the court, given by Judge Depue, there was a full examination of cases on the subject of the admissibility of parol evidence in actions on policies of insurance, and some of his observations are so weighty, and so applicable to the case before us, we shall quote from them at some length:

"The leading case in New York is *Jennings* v. *Chenango Insurance Company*, (2 Denio, 75.) This case held, in accordance with a series of cases, beginning with *Vandercoort* v. *Columbian Insurance Company*, (2 Caines, 155,) that parol evidence that the insured truly informed the agent of the insurer, who prepared the application, as to the situation of the premises, was not competent to vary a warranty on that subject, or save the insured from the consequences of a breach of the contract of insurance. This case was recognized as good law by the courts of that State until the decision in *Plumb* v. *Cattaraugus Insurance Company*, (18 N. Y. 392,) where such evidence was held by a divided court to be admissible, not to change the contract, but to produce the same result under the guise of an equitable estoppel. *Plumb* v. *Cattaraugus Insurance Company* was followed in *Rowley* v. *Empire Insurance Company*, (36 N. Y. 550.) It was justly criticized and condemned as founded on erroneous views, by the Chief Justice in *Dewees* v. *Manhattan Insurance Company*, as reported in 6 Vroom, 336, and with *Rowley* v. *Empire Insurance Company*, has been greatly shaken by subsequent decisions in the same court, if it was not

practically overruled by *Rohrbach* v. *Germania Insurance Company*, (62 N. Y. 47, 63.) In *Maher* v. *Hibernia Insurance Company*, (67 N. Y. 283,) reformation of the contract of insurance seems to have been regarded as the appropriate method of relief under such circumstances.

"The condition of the law on this important subject in that State is such that it would not be advisable to adopt it, or prudent to endeavor to follow the decisions of its courts. The discordant and irreconcilable decisions which have grown out of the departure from the law as held in *Jennings* v *Chenango Co. Ins. Co.* are cited by Judge Folger in *Van Schaick* v *Niagara Fire Ins. Co.*, (68 N. Y. 438.) Some of the conditions of the policy may be controlled by evidence of the knowledge of the parties at the time the insurance was effected, and others not; but no rule or principle has been promulgated for ascertaining, in advance of the litigation, what stipulations in the contract belong to the one class or the other—a condition of the law sure to result from the effort to deal with contracts of this kind in disregard of established rules of law and acknowledged legal principles. . . .

"It is manifest that the theory that such parol evidence, though it may not be competent to change the written contract, may be received for the purpose of raising an estoppel *in pais*, is a mere evasion of the rule excluding parol testimony when offered to alter a written contract. A party suing on a contract in an action at law must be conclusively presumed to be aware of what the contract contains, and the legal effect of his agreement is that its terms shall be complied with. Extrinsic evidence of the kind under consideration must entirely fail in its object, unless its purpose be to show that the contract expressed in the written policy was not, in reality, the contract as made. A defendant cannot be estopped from making the defense that the contract sued on is not his contract, or that his adversary has himself violated it in those particulars which are made conditions to his right under it, on the ground of negotiations and transactions occurring at the time the contract was entered into, unless the plaintiff is permitted to show from such sources that the contract, as put in writing, does not truly express the intention of the parties. The difficulty lies at the very threshold. An estoppel cannot arise except upon proof of a contract different from that contained in the written policy, and an inflexible rule of evidence forbids the introduction of such proof by parol testimony, when offered to vary or affect the terms of the written instrument.

"The cases usually cited for the proposition that a contract of insurance is excepted out of the class of written contracts with respect to the admissibility of parol evidence to vary or control the written contract, will be found on examination to be, to a large extent, those in which the proof has been received with a view to a reformation of the policy in equity, or to meet the defense that the contract was induced by false and fraudulent representations not embodied in the contract, or are the decisions of courts in which the legal and equitable jurisdictions are so blended that the functions of a court of equity have been transferred to the jury box. . . . 'The powers of agents of every kind of principals, to act for and bind their principals, are determined by the unvarying rule of ascertaining what authority is delegated to them. How the contract was effected, whether directly with the insurer or by the intervention of agents, is of no consequence. The question of the admissibility of the testimony

does not relate to the method by which the contract was made. It concerns the rule of evidence by which the contract, however made, shall be interpreted.

"Upon principle, it is impossible to perceive on what ground such testimony should be received. A policy of insurance is a contract in writing, of such a nature as to be within the general rule of law that a contract in writing cannot be varied or altered by parol testimony. If it be ambiguous in its terms, parol evidence, such as would be competent to remove an ambiguity in other written contracts, may be resorted to for the purpose of explaining its meaning. If it incorrectly or imperfectly expresses the actual agreement of the parties, it may be reformed in equity. If strict compliance with the conditions of insurance, with respect to matters to be done by the insured after the contract has been concluded, has been waived, such waiver may, in general, be shown by extrinsic evidence, by parol. Further than this, it is not safe for a court of law to go. To except policies of insurance out of the class of contracts to which they belong, and deny them the protection of the rule of law that a contract which is put in writing shall not be altered or varied by parol evidence of the contract the parties intended to make, as distinguished from what appears, by the written contract, to be that which they have in fact made, is a violation of principle that will open the door to the grossest frauds. . . . A court of law can do nothing but enforce the contract as the parties have made it. The legal rule that in courts of law the written contract shall be regarded as the sole repository of the intentions of the parties, and that its terms cannot be changed by parol testimony, is of the utmost importance in the trial of jury cases, and can never be departed from without the risk of disastrous consequences to the rights of parties."

Dewees v. *Manhattan Ins. Co.*, (35 N. J. Law Reports, 366,) referred to in the case just cited, reports an opinion by Chief Justice Beasly, and from which we shall quote, as it contains, as we think, an able and sound statement of the law on this important subject:

"The contract between these litigants, on the point which I shall discuss, is clear and unambiguous. The defendants agreed to insure a building occupied as a country store, and the stock of goods, consisting of the usual variety of such a store. This, by the plain meaning of the terms, is a warranty on the part of the insured that the building was used, at the date of the agreement, for the purpose specified. It was a representation, on the face of the policy, touching the premises in question, and which affected the risk; and such a representation, according to all the authorities, amounts to a warranty. . . . The cases are numerous and decisive upon the subject—so much so, that it does not appear to me to be necessary to refer to them in detail, as, in my opinion, the character of a representation of this kind is apparent upon its face. It can be intended for no other purpose than to chararterize the use of the building at the date of the insurance; for, unless this be done, there can be no restriction on the use of the property by the insured, during the running of the risk. Unless this description has the force thus attributed to it, the premises could have been used for any of the most hazardous puposes. A building described in a policy as a dwelling house could, except for

the rule above stated, be converted into a mill or factory. I think it is incontestably clear that the description of the use of the premises in this case was meant to define the character of the risk to be assumed by the defendants.

"But, besides this, it is plain that the written contract was violated, in a fatal particular, by the assured. By the express terms of one of the stipulations of the insurance, it is declared that, if the premises should be used 'for the purpose of carrying on therein any trade or vocation, or for storing or keeping therein any articles, goods or merchandise denominated hazardous, or extra hazardous, or specially hazardous, in the second class of the classes of hazards annexed to this policy, &c., from thenceforth, so long as the same shall be so used, &c., the policy shall be of no force or effect.' Among the extra hazardous risks, that of keeping a 'private stable' is enunciated, and it was shown on the trial, and was not denied, that, at the date of the policy, and at the time of the fire, a part of the building insured was applied by the plaintiff to this use.

"It cannot be denied, then, that if we take into view these conditions of the case alone, the plaintiff's action must fall to the ground. He did an act which, by force of his written agreement, had the effect to suspend, temporarily, his insurance. As this fact, having this destructive effect, could not be disputed, it became necessary, in order to save the plaintiff's action, to avoid the effect of the written contract; and this burden was assumed, on the argument, by the counsel of the plaintiff. The position taken with this view was, that the policy was obtained for the plaintiff by the agents of the defendant, and that they knew that the building in question was, in part, used as a stable.

"The plaintiff's claim appears to be a meritorious one, and on this account, and in the hope that there might be found some legal ground on which to support this action, the case was allowed by me, at the circuit, to go to the jury, and the questions of law were reserved for this court. But the consideration which I have since given the matters involved has excluded the faintest idea that, upon legal principles, this suit can be successfully carried through. In my opinion, that end can be attained only by the sacrifice of legal rules which are settled, and are of the greatest importance. Let us look at the proposition to which we are asked to give our assent.

"The contract of these parties, as it has been committed to writing, is, that if the plaintiff shall keep a stable on the premises insured, for the time being, the policy shall be vacated. But, it is said, the agents of the defendants who procured this contract were aware that the real contract designed to be made was, that the plaintiff might apply the premises to this use. This knowledge of the agent of the defendants, and which, it is contended, will bind the defendants, is to have the effect to vary the obligations of the written contract. Upon what principle can this be done? There is no pretense of any fraud in the procurement of this policy. The only ground that can be taken is, that the agent, knowing that the premises were to be, in part, used as a stable, should have so described the use in the policy. The assumption is, and must be, that the warranty, in its present form, was a mistake in the agent. But a mistake cannot be corrected, in conformity with our judicial system, in a court of law. No one can doubt that, in a proper case of this kind, an equitable remedy exists. 'There cannot be, at the present day,' says Mr. Justice Story, 'any serious

doubt that a court of equity has authority to reform a contract, where there has been an omission of a material stipulation by mistake; and a policy of insurance is just as much within the reach of the principle as any other contract. (*Andrews* v. *Essex Fire & Marine Ins. Co.*, 3 Mason, 10.)'

"It is possible, therefore, that in this case, in equity the present contract might be reformed, so as to permit the plaintiff to keep his stable in this building; but I think it has never before been supposed that this end could be reached in this State, by proof before the jury in a trial at the circuit. The principle would cover a very wide field, for, if this mistake can be there corrected, so can every possible mistake. If the plaintiff can modify the stipulation with respect to the restricted use of the premises, on the plea of a mistake in the stipulation, on similar grounds it would be open to the company to modify the policy with respect to the amount insured. I am at a loss to see how, on the adoption of the principle claimed, we are to keep separate the functions of our legal and equitable tribunals. Nor do I think, if this court should sustain the present action, that it could be practicable to preserve, in any useful form, the great primary rule that written instruments are not to be varied or contradicted by parol evidence. The knowledge of the agent in the present transaction is important only as showing what the tacit understanding of the contracting parties was. Suppose, instead of proof of such tacit understanding, the plaintiff had offered to make a stronger case by showing that the agent expressly agreed that the building might be used not only as a country store, as the policy stated, but also as a stable, and that the restraining stipulation did not apply to the extent expressed. Can any one doubt that, according to the practice and decisions in this State, such proof would have been rejected? A rule of law admitting such evidence would be a repeal of the principle, giving a controlling efficacy to written agreements. The memory and understanding of those present at the formation of the contract would be quite as potent as the written instrument.

"I have not found that it is anywhere supposed that this general rule which illegalizes parol evidence under the conditions in question has been relaxed with respect to contracts of insurance. Decisions of the utmost authority, both in England and in this country, propound this doctrine as applicable to policies in the clearest terms."

After citing a number of cases, the Chief Justice took notice of the case of *Plumb* v. *The Cattaraugus Ins. Co.*, (18 N. Y. 392,) in the following terms:

"In the case from New York here referred to, there was, in the application for the policy, a misdescription of the distance of the adjacent buildings from the premises insured, and to this defense the reply was, that the agent of the company had made the measurements, and had obtained the signature of the plaintiff, on the assurance 'that the application was all right and just as it should be.' The court decided that the declaration of the agent could not be offered for the purpose of altering or contradicting the written contract, but that it was admissible as an *estoppel in pais*. Now it is at once obvious that, by force of that view, the agreement in question was enforced, not in the sense of the written terms, but in the sense of the oral evidence, and that the practical result was precisely the same as though the instrument had been reformed in conformity to such evidence at the trial. I think there is no doubt that this application of the doc-

trine of estoppel to written contracts is an entire novelty. In the long line of innumerable cases which have proceeded and been decided on the ground that parol evidence is not admissible as against a written instrument, no judge or counsel ever intimated, as it is believed, that the same result could be substantially attained by a resort to this circuity. It is true that, if there be a substantial ground in legal principle for its introduction, the fact that it is new will not debar from its adoption; but I have not been able to perceive the existence of such substantial ground. In my apprehension the doctrine can be made to appear plausible only by closing the eyes to the reason of the rule which rejects, in the presence of written contracts, evidence by parol. That reason is, that the common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected, whose effect is to vary or contradict such expressed understandings. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradictory of a written instrument has the same tendency; but such evidence is rejected not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties. In the case now criticized, the party insured stipulated against the existence of buildings within a definite number of feet from the insured property; by the admission of parol testimony, this stipulation was restricted and limited in its effect. This result, no doubt, was strictly just, if we assume that the parol evidence was true; but, standing opposed to the written evidence, the law presumes the reverse. The alternative is unavoidable—it is a choice between that which is written and that which is unwritten. In the case cited, the effect of the rule adopted by the court was to give a different effect to the written term from that which they intrinsically possessed—a result induced by the admission of oral evidence. This, I cannot but think, was a palpable alteration of the agreement of the parties. The mistake of the court appears to have been in regarding simply the legal effect of the facts which were proved by parol. Receiving that testimony into the case, a clear estopped was made out; but the error consisted in the circumstance that such oral evidence was, on rules well settled, inadmissible. The question presented was purely one as to a rule of evidence, but it was treated as a problem relating to the application of legal principles to an admitted state of facts. The case was not decided by a unanimous court, three judges dissented, and, in my judgment, that dissent was based on satisfactory grounds. . . . The facts now before us do not present the elements of an estopped. Such a defense rests on a misconception as to a state of facts, induced by the party against whom it is set up. The person who seeks to take advantage of it must have been misled by the words or conduct of another. Now, in the present case, the agent did not make any statement nor did he do anything which led the plaintiff to alter his condition. The most that can be laid to his charge is that from carelessness he omitted properly to describe the use of the premises described. But this was not a misstatement of a fact on which the plaintiff acted, because the plaintiff was aware of the circumstance that the building was put to another use. The alleged error

in the description is plain on the face of the policy, and the law incontestably charges the parties with knowledge of the meaning and effect of their own written contract. To found an estoppel on the ignorance of the plainly expressed meaning of his own contract would be absurd."

In Pennsylvania, it has always been held that courts of law will not permit the terms of written contracts to be varied or altered by parol evidence of what took place at or before the time the contracts were made, and that policies of insurance are within the protection of the rule.

Thus, when it was stipulated in the conditions of insurance that a false description of the property insured should avoid the policy, it was held that a misdescription defeated the plaintiff's right to recover under it, though the statements were known to be false by the insurer's agent, who prepared the description, and informed the plaintiff that in that respect the description was immaterial. (*Smith* v. *Cash Mut. Ins. Co.*, 24 Penn. St. 320; *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331.)

In *Commonwealth Mutual Fire Insurance Company* v. *Huntzeneger*, (98 Penn. St. 41,) the subject was examined at length and the previous cases considered, and it was held that mere mutual knowledge by the assured and the agent of the falsity of a fact warranted is entirely inadequate to induce a reformation of the policy so as to make it conform with the truth; that itis rather evidence of guilty collusion between the agent and the assured, from which the latter can derive no advantage. "The conditions of insurance," said the court, "provide that notice of additional insurance, or of any change in existing insurance, shall be given to the company by the insured in writing, and shall be acknowledged in writing by the secretary; and no other notice shall be binding or have any force against the company. In absence of evidence of waiver of the notice required in this stipulation, we do not think the jury would be justified in inferring that the knowledge of the agent will bind the principal of notice of subsequent insurance or surrender of previous insurance. The parties agreed that written notice should be given, and in like manner acknowledged by the secretary; mere knowledge of an agent is not the equivalent of that."

That the law enunciated in these and numerous other cases in Pennsylvania was not overturned by the case of *Kalmutz* v. *Insurance Company*, (186 Penn. St. 571,) as claimed in the brief of defendant in error, will appear on examining the facts of that case and the reasoning of the court.

The opinion shows that the court refused to hold that what was alleged to have taken place at the time the contract was entered into might be received to change the legal effect of the policy, Sterrett, C. J., saying:

"The policy in suit contains this provision as to other insurance: 'Policies of all other insurance upon property herein described—whether made prior or subsequent to the date hereof—must be endorsed on this policy, otherwise the insurance shall be void.' The existence of such

other insurance of which no endorsement was made on the policy, was conceded; and, in order to avoid the effect of the condition above quoted, the plaintiff undertook to prove that the defendant company, by its own acts, had waived the condition, and was thereby estopped from setting it up as a bar to his recovery. As is usual in such cases, there was more or less conflicting testimony as to what passed between the plaintiff and the company's agent at the inception of the contract. In the court below, as well as here, it was forcibly contended on plaintiff's behalf that the testimony referred to was sufficient to warrant the jury in finding such facts as legally constitute an estoppel; *but, inasmuch as the record discloses other undisputed evidence which necessarily leads to the same conclusion,* it is unnecessary to consider in detail the conflicting testimony that was submitted to the jury on that question. The policy in suit was issued in April, 1894, and the last assessment thereon was made in October following. Defendant company's secretary testified that he had notice of the additional insurance on the first Wednesday of November, 1894. Notwithstanding that notice to the company, the policy was neither recalled nor canceled; the premiums or assessments collected were not returned, nor was any effort made to return the premium note given by plaintiff, binding him to pay the premiums at such times and in such manner as the company's directors might by law require. These facts were admitted; and if, as the authorities appear to hold, they operated as an estoppel, it will be unnecessary to consume time in the consideration of other questions sought to be raised by several of the specifications of error."

The court then cited *Elliott* v. *Lycoming County Ins. Co.*, (66 Pa. 26,) where Justice Sharswood said:

"Undoubtedly, if the company, after notice or knowledge of the over insurance, treated the contract as subsisting, by making and collecting assessments under it from the insured, they could not afterwards set up its forfeiture. It would be an estoppel, which is the true ground upon which the doctrine of waiver in such cases rests. . . . Enough has been said to show that upon the undisputed evidence in the case the learned trial judge would have been warranted in holding, as matter of law, that the defendant was estopped from setting up the condition above quoted as a bar to plaintiffs' claim, and in instructing the jury accordingly."

As, therefore, there was no limitation put in the policy upon the powers of the company's secretary, and as the company, after having received notice of the existence of other insurance, declined to avail itself of the right to rescind the contract, but, on the contrary, elected to enforce payments under the terms of the policy as a subsisting contract, and these facts having been made to appear by undisputed evidence, the court would seem to have been justified in applying the doctrine of estoppel.

It must be conceded that it is shown, in the able brief of the defendant in error, that, in several of the States, the courts appear to have departed from well-settled doctrines, in respect both to the incompetency of parol evidence to alter written contracts, and to the binding effect of stipulations in policies restricting the authority of the company's agents. The nature

of the reasoning on which such courts have proceeded will receive our consideration when we come to discuss the particular terms of the contract before us.

Leaving, then, the State courts, let us inquire what is the voice of the Federal authorities.

We do not consider it necessary or profitable to examine in detail the decisions of the Circuit Courts or of the Circuit Courts of Appeals. It is sufficient, for our present purpose, to say that the Circuit Court of Appeals for the Seventh Circuit has held consistently to the doctrines on this subject laid down by the English and American courts generally, (*United Firemen's Ins. Co.* v. *Thomas*, 82 Fed. Rep. 406,) and that the Court of Appeals for the Eighth Circuit, in the present case, has, by a majority of its members, adopted and applied the view that a written contract may, in an action at law, be changed by parol evidence, and that such clauses as restrict the power of agents of insurance companies to contract otherwise than by some writing should be given effect, if at all, as they respect such modifications of a policy as are made or attempted to be made after it has been delivered and taken effect as a valid instrument, and should not be considered as having relation to acts done by the company or its agents at the inception of the contract. (101 Fed. Rep. 77.)

In such divergence of decisions, we have deemed it proper to have the present case brought before us by a writ of certiorari.

As to the fundamental rule, that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are vitiated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as invariable and salutary. The rule itself and the reasons on which it is based are adequately stated in the citations already given from the standard works of Starkie and Greenleaf.

Policies of fire insurance in writing have always been held by this court to be within the protection of this rule.

The first case to be examined is *Carpenter* v. *Providence-Washington Ins. Co.*, (16 Pet. 495.) The importance of this case is great, because, if the conclusion there reached was sound when expressed, and if it has not been overruled by our subsequent decisions, it is decisive of the case before us.

And first, as to the facts of that case, in so far as they resemble those with which we have now to deal. They were thus stated by Mr. Justice Story, who delivered the unanimous opinion of the court:

"This is a writ of error to the Circuit Court for the District of Rhode Island. The original action was brought by Carpenter, the plaintiff in error, against the Providence-Washington Insurance Company, the defendants in error, upon a policy of insurance underwritten by the insurance company of fifteen thousand dollars 'on the Glenco Cotton Factory, in the State of New York,' owned by Carpenter, against loss or damage

by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the following: 'And provided further, that in case the insured *shall have already any other insurance on the property hereby insured, not notified to this corporation and mentioned or endorsed upon this policy, then* this insurance shall be void and of no effect.' 'And if the said insured or his assigns *shall hereafter make* any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same endorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property.' . . . Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: 'Notice of all *previous* insurances upon property insured by this company shall be given to them, and endorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect.'

"The declaration averred that during the continuances of the policy he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which the company had due notice and proof. The cause came on for trial on the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exception to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial; and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions. . . .

"From the 17th of October, 1836, to the 6th of December, 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler & Co. On that day Samuel G. Wheeler sold and conveyed his moiety to Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then due six thousand dollars, which Carpenter assumed to pay. There had been a prior policy on the premises in the Washington Insurance office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss, the amount to be paid to him. That policy expired on the 27th of September, 1838, the day on which the policy, upon which the present suit is brought, was effected. It is proper farther to state that other policies on the same factory had been effected and renewed from time to time, from December 12, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence, called the American Insurance Company; and

among these was a policy effected, by way of renewal, on the 14th of December, 1837, in the name of Henry M. Wheeler & Co., for six thousand dollars, for the benefit of Henry M. Wheeler and Carpenter, (who were then the joint owners thereof,) payable in case of loss to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety having been notified to the American Insurance Company, the latter agreed to the assignment; and the policy thenceforth became a policy for Carpenter, payable in case of loss to Epenetus Reed. And on the 23d of May, 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy thus effected on the 14th of December, 1837, in the American Insurance Company was, as the Washington Insurance Company assert, not notified to them at the time of effecting the policy made on the 25th of September following, and declared upon in the present suit; nor was the same ever mentioned in, or endorsed upon the said policy; and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void. Subsequently, viz., on the 11th day of December, 1838, the American Insurance Company renewed the policy of the 14th of December, 1837, for Carpenter, and at his request, for one year. This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account also, the Washington Insurance Company insist that their policy of the previous 27th of September, 1838, is, according to the stipulation therein contained, utterly void.

"It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the six thousand dollars insured thereby; and that at the November term, 1839, of the Circuit Court, the company set up as a defense that there was a material misrepresentative of the cost and value of the property in the factory insured made to them at the time the original insurance; and it being intimated by the court that if such was the fact it would avoid the policy, the plaintiff acquiesced in that decision, and discontinued or withdrew the action before verdict.

"The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion, which we are to pronounce, to recite them at large, *intotidem verbis*, since the points on which they turn admit of a simple and exact exposition."

After disposing of the first instruction, which does not relate to our present inquiries, the court said:

"The second instruction asked proceeds upon the ground that although the policy of the American Insurance Company of the 6th of December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was deemed to be utterly null and void, and therefore, as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared.

"The court refused to give the instruction; and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance office was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided, but was still held by the assured as valid, then, that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void. We are of opinion that the instruction, as asked, was properly refused, and that given was correct."

After discussing the question, the court added the following observations:

"Indeed, we are not prepared to say that the court might not have gone further, and have held that a policy—existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to extrinsic facts—should have been notified to the underwriters, even although by proofs afforded by such extrinsic facts it might be held in its very origin and concoction a nullity.

"And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might naturally affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest of the assured in the premises insured as will guaranty on his part vigilance, care and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assurred. Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are only to be liable for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute towards any loss; and whether there be any other insurance or not upon the property, is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters.

"The public, too, have an interest in maintaining the validity of these clauses, and giving them full operation and effect. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential in the present state of our country for the protection of the vast interests embarked in manufactures and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and the premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums, and to make it difficult to obtain insurance where the parties live, or the property is situate, at a distance from the place where the insurance is sought. But be these considerations as they may, we see no

reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for their stipulations, would not have been entered into.

"We are, then, of opinion that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable.

"The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American office, that 'was in law a compliance with the terms of the policy.' The court refused to give the instruction as prayed, but instructed the jury that, at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned or endorsed upon the policy; otherwise the insurance was to be void and of no effect.

"We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or endorsement as it positively requires, and without which it declares the policy shall henceforth be null and of no effect."

Two propositions, then, are clearly established by this decision: (1) That where a policy provides that notice shall be given of any *prior* or *subsequent* insurance, otherwise the policy to be void, such a provision is reasonable and constitutes a condition, the breach of which will avoid the policy; (2) That where the policy provides that notice of *prior* or *subsequent* insurance must be given by endorsement upon the policy or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition, the breach of which will avoid the policy.

We are next to inquire whether this decision has been overruled, or whether it remains as an authoritative declaration of the law.

Shortly after the case was decided at law, it appears, that an effort was made by said Carpenter to invoke the aid of a court of equity to enable him to avoid the effect of his own disregard of the conditions contained in the policy. (*Carpenter* v. *Providence-Washington Insurance Company*, 4 How. 185.)

This court held, affirming the Circuit Court of the United States for the District of Rhode Island, sitting in equity, that, under the facts disclosed by the pleadings and evidence, the complainant was not entitled to equitable relief.

"It is a matter of regret that so great a loss, which the plaintiff and those under whom the claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered that the defendant, gave abundant and repeated notice to him, in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject. If the plaintiff, after all this, omitted to comply with so substantial so provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect, or that of some of the agents he employed. An adherence to such important rule is peculiarly necessary for the protection of absent stockholders, often interested exclusively in insurance companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions."

Carpenter v. *Providence Insurance Co.*, (16 Pet. 495,) has been frequently referred to as an authority in subsequent cases on points collateral to the one we are now considering. (*Taylor* v. *Benham*, 5 How. 260; *Russell* v. *Southward*, 12 How. 145; *Oates* v. *National Bank*, 100 U. S. 246; *Burgess* v. *Seligman*, 107 U. S. 34.)

In *Phœnix Life Insurance Co.* v. *Raddin*, (120 U. S. 183, 189,) we find *Carpenter* v. *Providence Insurance Co.* cited, per Mr. Justice Gray, as an authority for the proposition that "the parties may by their contract make material a fact that would otherwise be immaterial, or make immaterial a fact that would otherwise be material. Whether there is other insurance on the same subject, and whether such insurance has been applied for and refused, are material facts, at least when statements regarding them are required by the insurers as part of the basis of the contract."

It is not pretended in the opinion of the majority in the Circuit Court of Appeals in the present case that the case of *Carpenter* v. *Providence-Washington Insurance Co.* has been modified or overruled by this court, but the cases relied on by that court are wholly decisions of several State courts and of some of the Circuit Courts. Nor is it claimed by the learned counsel for the defendant in error that the Carpenter case has been formally overruled or modified by this court. He, however, does cite three decisions of this court which, as he views them, should be regarded as abandoning the doctrines of that case, viz. *Insurance Co.* v.

Wilkinson, (13 Wall. 232;) *Eames* v. *Home Insurance Co.*, (94 U. S. 621,) and *Insurance Co.* v. *Norton*, (96 U. S. 234.)

These cases must, therefore, receive our attention. What, then, was the case of *Insurance Co.* v. *Wilkinson?* That was a case where the agent of a life insurance company had inserted in the application a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person and inserted without the assent of the assured. It was held that this untrue statement contained in the application did not invalidate the policy; that permitting verbal testimony to show how this untrue statement found its way into the application did not contradict the written contract sued on, but proceeded on the ground that this statement was not that of the assured. The trial court said to the jury that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defense to the action to show that the agent was mistaken. The case, as reported, does not disclose that the plaintiff's testimony as to the way in which the untrue statement was put in the application was contradicted or denied by the company. It may therefore be presumed that the plaintiff's case, in that respect, was made out by undisputed evidence. And it would seem, such being the state of facts, that this court had reason to hold that the untrue statement was not made by the assured, and that it would operate as a fraud on the plaintiff if he were not permitted to show this fact, which was not a fact or statement contained in the policy sued on, but an extrinsic fact or statement contained in the application. The defense made upon that statement was, in legal effect, a denial of the execution of the statement—a defense that can always be sustained by parol evidence.

However this may have been, we are unwilling to have the case regarded as one overthrowing a general rule of evidence. Some of the remarks contained in the opinion might seem to bear that interpretation, but not necessarily so.

That Mr. Justice Miller did not intend, in the case of *Insurance Company* v. *Wilkinson*, to lay down a new rule of evidence in insurance cases, is clearly shown in the subsequent case of *Insurance Co.* v. *Lyman*, (15 Wall. 664,) where the opinion was delivered by the same learned justice, and who used the following language:

"Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing.

"But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it was in other classes of contract, and must have the same effect in excluding parol testimony in its application to it that other written instruments have.

"Counsel for the defendants in error here relies on two propositions, namely, that the policy, though executed January 5, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and, secondly, that they can abandon the written contract altogether and recover on the parol contract.

"We do not think that either of these propositions is sound. Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company. When the company came to make this instrument they were entitled to the information which the plaintiff had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question could have been raised of the validity of the instrument or of fraud practiced by the insured. On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract, if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

"To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

"We think it equally clear that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are merged and excluded when the parties assent to a written instrument as expressing the agreement."

Eames v. *Home Insurance Company*, (94 U. S. 621,) in another case relied on as showing that the general rule of evidence was not applicable in insurance cases. But that was the case of a bill in equity filed against an insurance company of New York to require said company to issue to the complainants a policy of insurance against loss or damage by fire, in pursuance of a contract for that purpose alleged to have been made with their agents in Illinois. It was made to appear that the terms of a contract for insurance upon property which was destroyed by fire before the policy was received had been agreed upon. This agreement was manifested by an application signed by the complainant, and in several letters

which had passed between the local agent and the general agent of the company, and between the complainant and the local agent. The report of the case states that there was an agreement as to certain facts by the attorneys in the cause, but what those facts were does not distinctly appear in the report. However, all that can be claimed for the case is that this court considered, from the agreement as to facts between the attorneys and from the application and the several letters between the agents and the complainant, that a case was made out justifying a court of equity to decree that complainant was entitled to a policy of insurance to be issued for the amount and at the premium shown by the proofs. What was the scope of the authority of the agents who prepared the application and conducted the correspondence does not appear, but the court seems to have assumed that it sufficiently appeared that the agents had authority to act as they did. It is not perceived that this case has any valid application to the case now before us, beyond apparently holding, with *Insurance Company* v. *Wilkinson*, in 13 Wall., that it may be shown by parol that a statement which purports to have been made by an applicant for insurance was not, in point of fact, his statement, but was really that of the agent.

The next case relied on is *Insurance Co.* v. *Norton*, (96 U. S. 234,) and in which it was held by a majority of this court that an insurance company may waive any condition of a policy inserted therein for its benefit. As to this proposition there was, and could have been, no disagreement among the judges, but the difference arose over the sufficiency of the evidence to show the waiver. The question really was whether the company's agent had authority to extend the payment of a premium note, notwithstanding a provision in the policy that a failure to pay the note at maturity would incur a failure of the policy, and a declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures. It was held by the majority that a waiver by the company of both these conditions might be shown by admitting evidence as to the practice of the company in allowing its agents to extend the time for payment of premiums and of notes given for premiums, as indicative of the power given to those agents, and that error was not committed by submitting to the jury, upon such evidence, to find whether the defendants had or had not authorized its agent to make an extension in this case. In speaking for the majority, Mr. Justice Bradley said:

"The written agreement of the parties, as embodied in the policy and the endorsement thereon, as well as in the notes and the receipt given therefor, was undoubtedly to the express purport that a failure to pay the notes at maturity would incur a forfeiture of the policy. It also contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeiture. And those terms, had the company so chosen, it could have insisted on.

But a party always has the option to waive a condition or stipulation in his own favor. The company was not bound to insist upon a forfeiture, though incurred, but may waive it. . . . That the company did authorize its agents to take notes, instead of money for premiums, is perfectly evident from its constant practice of receiving such notes when taken by them. That it authorized them to grant indulgence on these notes, if the evidence is to be believed, is also apparent from like practice. It acquiesced in and ratified their acts in this behalf."

Mr. Justice Strong, speaking for the dissenting parties, said:

"The insurance effected by the policy became forfeited by the non-payment *ad diem* of the premium note; the policy then ceased to be a binding contract. It was so expressly stipulated in the instrument. Admitting that the company could afterwards elect to treat the policy as still in force, or, in other words, could waive the forfeiture, the local agent could not, unless he was so authorized by his principals. The policy declared that agents should not have authority to make such waivers. And there is no evidence in this case that the company gave to the agent parol authority to waive a forfeiture after it had occurred. They had ratified his acts extending the time of payment of premium notes, when the extension was made before the notes fell due. But no practice of the company sanctioned any act of its agent, done after a policy had expired, by which new life was given to a dead contract."

Whatever may be thought of these divergent views, it is clear that the facts of that case are widely different from those here under consideration, where there is no evidence whatever of a waiver by the company, or of authority to the agent, express or implied, from a course of practice by the company. Here, the company "has chosen," in the language of Mr. Justice Bradley, "to insist upon the terms of the written contract."

The subject of waiver by agents was further considered in the case of *Insurance Co.* v. *Wolff*, (95 U. S. 326,) when the unanimous opinion of the court was delivered by Mr. Justice Field:

"By the residence of the insured within the prohibited district of country during the period designated in the policy without the previous consent of the company, and the failure to pay the annual premium when it became due, the policy, by its express terms, was forfeited, and the company relieved from liability, unless the forfeiture was waived by the action of the company, or of its agents authorized to represent it in that particular.

"The waiver of the forfeiture for the non-payment of the premium due on the 1st of November, 1872, is alleged on the ground that the premium was subsequently paid to an agent of the company, he delivering its receipt for the same, signed by its secretary and countersigned by the manager of the local office, the plaintiff contending that the company, by its previous general course of dealing with its agents, and its practice with respect to the policy in suit, had authorized the premiums to be paid and the agent to receive the same after they became due, and thus had waived any right to a strict compliance with the terms of the policy as to the payment of premiums.

"The waiver of the forfeiture arising from the residence within the prohibited district between the 1st of July and November, without the previous consent of the company, is also alleged from the subsequent payment of the premiums and its receipt by the local agent, the plaintiff contending that the premium was received with knowledge by the agent of the previous residence of the insured within the prohibited district. . . .

"The conditions mentioned in the policy could, of course, be waived by the company, either before or after they were broken; they were inserted for its benefit, and it depended on its pleasure whether they should be enforced. The difficulty in this case, and in nearly all cases where a waiver is alleged in the absence of written proof of the fact, arises from a consideration of the effect to be given to the acts of agents of the company in their dealings with the assured. Of course, such agents, if they bind the company, must have authority to waive a compliance with the conditions upon the breach of which the forfeiture is claimed, or to waive the forfeiture when incurred, or their acts waiving such compliance or forfeiture must be subsequently approved by the company. The law of agency is the same, whether it be applied to the act of an agent undertaking to continue a policy of insurance or to any other act for which his principal is sought to be held responsible. . . .

"The company, notwithstanding the provision in the policy that its agents were not authorized to waive the forfeitures, sent to them renewal receipts signed by its secretary, to be used when countersigned by its local manager and cashier, leaving their use subject entirely to the judgment of the local agent. The propriety of their use, in the absence of any fraud in the matter, could not afterwards be questioned by the company. . . . So far, then, as the waiver of the forfeiture incurred for non-payment of the premiums is concerned, it is clear that the company, by its course of dealing, had, notwithstanding the provision of the policy, left the matter to be determined by the local agent, to whom the renewal receipts were entrusted.

"But so far as a forfeiture arose from the residence of the insured within the prohibited district, the case is different. There is nothing in the acts of the company which goes to show that it ever authorized its agents to waive a forfeiture thus incurred, or that it ever knew of any residence of the insured within the prohibited district until informed of his death there. In every case where premiums were received after the day they were payable, the fact that a forfeiture had been incurred was made known to the company, from the date of its payment, and the retention of the money constituted a waiver of the forfeiture; but no information of a forfeiture on any other ground was imparted by the date of each payment. The agent receiving the premiums, in the case at bar, testified that he knew nothing of the residence of the insured within the prohibited district, and the evidence in conflict with his testimony was slight. He knew that the insured had a place of business there, and that he was permitted to make occasional visits there within that period, and to reside there at other periods. Everything produced as evidence of knowledge of residence within the proscribed district is consistent with these occasional visits and residence at other times than during the excepted period.

"But, even if the agent knew the fact of residence within the excepted period, he could not waive the forfeiture thus incurred without authority

from the company. The policy declared that he was not authorized to waive forfeitures; and to that provision effect must be given, except so far as the subsequent acts of the company permitted it to be disregarded. There is no evidence that the company in any way, directly or indirectly, sanctioned a disregard of the provision with respect to any forfeitures, except such as occurred from non-payment of premiums. As soon as it was informed of the residence of the insured within the prohibited district, it directed a return of the premium subsequently paid. It would be against reason to give to the receipt of the premium by the agent, under the circumstances stated, the efficacy claimed. The court, in its instructions, treated the receipt of the premium by the agent, with knowledge of the previous residence of the insured within the prohibited district, if the agent had said knowledge, as itself a sufficient waiver of the forfeiture incurred, without any evidence of the action of the company when informed of such residence; and in this respect we think the court erred. It is essential that the company should have had some knowledge of the forfeiture, before it can be held to have waived it. It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances coming to his knowledge affecting its liability; and if subsequently the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived. But here there was no ground for any inference of this kind from the subsequent action or silence of the company. There was no evidence of a disregard of the condition as to the residence of the insured in any previous year, and, consequently, there could be no inference of a waiver of its breach from a subsequent retention of the premium paid. This was a case where immediate enforcement of the forfeiture incurred was directed when information was received that the condition of the policy in that respect had been broken.

"Not only should the company have been informed of the forfeiture before it could be held by its action to have waived it, but it should also have been informed of the condition of the health of the insured at the time the premium was tendered, upon the payment of which the waiver is claimed. The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured, if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the company sought to be estopped from denying the waiver claimed should be apprised of all the facts; of those which created the forfeiture and of those which will necessarily influence its judgment in consenting to waive it. The holder of the policy cannot be permitted to conceal from the company an important fact, like that of the insured being *in extremis*, and then to claim a waiver of the forfeiture created by the act which brought the insured to that condition. To permit such concealment, and yet to give to the action of the company the same effect as though no concealment were made, would tend to sanction a fraud on the part of the policyholder, instead of protecting him against the commission of one by the company."

New York Life Insurance Co. v. *Fletcher*, (117 U. S. 519,) is an instructive case on the points in controversy here. The facts of the case, as stated in the syllabus, were as follows:

"A person applied in St. Louis to an agent of a New York insurance company for insurance on his life. The agent, under general instructions, questioned him on subjects material to the risk. He made answers which, if correctly written down and transmitted to the company, would have probably caused it to decline the risk. The agent, without the knowledge of the applicant, wrote down false answers, concealing the truth, which were signed by the applicant without reading, and by the agent transmitted to the company, and the company thereupon assumed the risk. It was conditioned in the policy that the answers were part of it, and that no statement to the agent not thus transmitted should be binding on his principal; and a copy of the answers, conspicuously printed upon it, accompanied the policy. *Held*, that the policy was void."

The unanimous opinion of the court was delivered by Mr. Justice Field, the principal portions of which were as follows:

"It is conceded that the statements and representations contained in the answers, as written, of the assured to the questions propounded to him in his application, respecting his past and present health, were material to the risk to be assumed by the company, and that the insurance was made upon the faith of them, and upon his agreement accompanying them that, if they were false in any respect, the policy to be issued upon them should be void. It is sought to meet and overcome the force of this conceded fact by proof that he never made the statements and representations to which his name was signed; that he truthfully answered those questions; that false answers, written by an agent of the company, were inserted in place of those actually given, and were forwarded with the application to the home office; and it is contended that, such proof being made, the plaintiff is not estopped from recovery. But on the assumption that the fact as to the answers was as stated, and that no further obligation rested upon the assured in connection with the policy, it is not easy to perceive how the company can be precluded from setting up their falsity, or how any rights upon the policy ever accrued to him. It is, of course, not necessary to argue that the agent had no authority from the company to falsify the answers, or that the assured could acquire no right by virtue of his falsified answers. Both he and the company were deceived by the fraudulent conduct of the agent. The assured was placed in the position of making false representations in order to secure a valuable contract which, upon a truthful report of his condition, could not have been obtained. By them the company was imposed upon, and induced to enter into the contract. In such a case, assuming that both parties acted in good faith, justice would require that the contract be cancelled and the premiums returned. As the present action is not for such cancellation, the only recovery which the plaintiff could properly have upon the facts he asserts, taken in connection with the limitation upon the powers of the agent, is for the amount of the premiums paid, and to that only would be entitled by virtue of the statute of the State of Missouri.

"But the case presented by the record is by no means as favorable to him as we have assumed. It was his duty to read the application he

signed. He knew that upon it the policy would be issued, if issued at all. It would introduce great uncertainty, in all business transactions, if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposal, and to enforce it notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail; and there is no reason why it should be applied merely to contracts of insurance. There is nothing in their nature which distinguishes them in this particular from others. But here the right is asserted to prove not only that the assured did not make the statements contained in his answers, but that he never read the application, and to recover upon a contract obtained by representations admitted to be false, just as though they were true. If he had read even the printed lines of his application, he would have seen that it stipulated that the rights of the company could in no respect be affected by his verbal statements, or by those of its agents, unless the same were reduced to writing and forwarded with his application to the home office. The company, like any other principal, could limit the authority of its agents, and thus bind all parties dealing with them with knowledge of the limitation. It must be presumed that he read the application, and was cognizant of the limitations therein expressed.

"In *Globe Insurance Co.* v. *Wolff*, (95 U. S. 329,) the policy declared that the agents of the company were not authorized to waive forfeitures, and this court held that effect must be given to the provision, except so far as the subsequent acts of the company permitted it to be disregarded. In *Insurance Co.* v. *Norton*, (96 U. S. 240,) the policy contained an express declaration that the agents of the company were not authorized to make, alter or abrogate contracts or waive forfeitures, and this court held that the company could have insisted upon those terms had it so chosen. . . . The present case is very different from *Insurance Co.* v. *Wilkinson*, (13 Wall. 222,) and from *Insurance Co.* v. *Mahone*, (21 Wall. 152.) *In neither of these cases was any limitation upon the power of the agent brought to the notice of the assured.* Reference was made to the interested and officious zeal of insurance agents to procure contracts, and to the fact that parties who were induced to take out policies rarely knew anything concerning the company or its officers, but relied upon the agent who had persuaded them to affect the insurance, 'as the full and complete representative of the company in all that is said or done in making the contract,' and the court held that *prima facie* the power of the agents are co-extensive with the business entrusted to his care, and would not be narrowed by limitations not communicated to the person with whom he dealt. Where said agents, not limited in their authority, undertake to prepare applications and take down answers, they will be deemed as acting for the companies. In such cases it may well be held that the description of the risk, though nominally proceeding from the assured, should be regarded as the act of the company. Nothing in these views has any bearing upon the present case. Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is, therefore, bound by its statements."

What, then, are the principles sustained by the authorities, and applicable to the case in hand?

They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that, where waiver is relied on, the plaintiff must show that the company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the action of the agent.

In the light of these principles, let us examine the contract that was made between the parties to the controversy before us. The contract was in writing, and in clear and unambiguous terms; that contract provided that "this entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the insured *now has, or shall hereafter* make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy," and that "no officer, agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of the policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions or conditions, no officer, agent or representative shall have power or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be

written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Such being the contract, and the property insured having been destroyed by fire on June 1, 1898, and the insurance company having denied liability because informed that other insurance was held by the insured on the same property, without the knowledge or consent of the company, this action was brought.

It is not pretended, as we understand the plaintiff's position, that by any language or declaration of the agent, at the time the policy was delivered and the premium paid, he claimed to have power to waive any provision or condition of the policy, nor that the plaintiff was induced to accept the policy by any promise of the agent to procure the assent of the company to permit the outstanding insurance and to waive the condition. The plaintiff's case stands solely on the proposition that because it is alleged, and the jury have found, that the agent had notice or knowledge of the existence of insurance existing in another company at the time the policy in suit was executed and accepted, and received the premium called for in the contract, thereby the insurance company is estopped from availing itself of the protection of the conditions contained in the policy. In other words, the contention is that an agent with no authority to dispense with or alter the conditions of the policy could confer such power upon himself by disregarding the limitations expressed in the contract, those limitations being according to all the authorities presumably known to be insured. It was not shown that the company, when it received the premium, knew of the outstanding insurance, nor that, when made aware of such insurance, it elected to ratify the act of its agent in accepting the premium. On the contrary, all the record discloses is that the jury found that the agent knew, when the policy in the defendant company was issued and delivered to the plaintiff, that there was then subsisting fire insurance to the amount of $1,500 in another fire insurance company, and that such knowledge had been communicated to the agent by or on behalf of the assured. There is no finding that the agent communicated to the company or to its general agent at Chicago, at the time he accounted for the premium, the fact that there was existing insurance on the property, and that he had undertaken to waive the applicable condition. Indeed, it appears from the letter of defendant's manager at Chicago, to whom the proofs of loss had been sent, which letter was put in evidence by the plaintiff and is set forth in the bill of exceptions, that the additional insurance held by the plaintiff was without the knowledge or consent of the company; and it further appears, and was found by the jury, that immediately on the company's being informed of the fact, the amount of the premium was tendered by the agents of the company to

the insured. So that there is not the slighest ground for claiming that the insurance company, with knowledge of the facts, either accepted or retained the premium. The plaintiff's case, at its best, is based on the alleged fact that the agent had been informed, at the time he delivered the policy and received the premium, that there was other insurance. The only way to avoid the defense aud escape from the operation of the condition, is to hold that it is not competent for fire insurance companies to protect themselves by conditions of the kind contained in this policy. So to hold would, as we have seen, entirely subvert well-settled principles declared in the leading English and American cases, and particularly in those of this court.

This case is an illustration of the confusion and uncertainty which would be occasioned by permitting the introduction of parol evidence to modify written contracts and by approving the conduct of agents and persons applying for insurance in disregarding the express limitations put upon the agents by the principal to be affected.

It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements into that form, is for the benefit of both parties. In the present case, if the witnesses on whom the plaintiff relied to prove notice to the agent had died, or had forgotten the circumstances, he would thus, if he had depended to prove his contract by evidence extrinsic to the written instrument, have found himself unable to do so. So, on the other side, if the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses. It is not an answer to say that such difficulties attend other transactions and negotiations, for it is the knowledge of the inconveniences that attend oral evidence that has led to the custom of putting important agreements in writing and to the legal doctrine that protects them when so expressed, and when no fraud or mutual mistake exists, from being changed or modified by the testimony of witnesses as to conversations and negotiations that may never have taken place, or the real nature and meaning of which may have faded from recollection.

Besides the importance of such considerations to the parties immediately concerned in business transactions, the community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies. It would be very unfortunate if prudent men should be deterred from investing capital in such companies by having reason to fear that conditions which have been found reasonable and necessary to put into policies to protect the companies from faithless agents and from dishonest insurers, are liable to be nullified by verdicts based on verbal testimony. Increased importance should be given to the rules

involved in this discussion by that fact that, in latter times and in most, if not all, of the States, statutory changes have opened the courts to the testimony of the very parties who have signed the written instrument in controversy.

The judgment of the Circuit Court of Appeals is reversed. The judgment of the Circuit Court is likewise reversed, and the cause remitted to that court with directions to proceed in conformity with this opinion.

The CHIEF JUSTICE, Mr. Justice HARLAN and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.